

(23,393)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 818.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN, APPELLANT,

vs.

FRANK H. HITCHCOCK, AS POSTMASTER GENERAL OF THE UNITED STATES; GEORGE W. WICKERSHAM, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Subpœna.

The President of the United States of America to Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States, in and for the Southern District of New York, Greeting:

You are hereby commanded that you and each of you personally appear before the Judge of the District Court of the United States of America for the Southern District of New York, in the Second Circuit in Equity, on the first Monday of November, A. D., 1912, where-soever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court, by The Journal of Commerce & Commercial Bulletin, and to do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the ninth day of October, in the year one thousand nine hundred and Twelve and of the Independence of the United States of America the one hundred and thirty-sixth.

THOMAS ALEXANDER, *Clerk.*

MORRIS & PLANTE, *Sol^{rs}.*

The defendants are required to enter appearance in the above cause in the Clerk's office of this Court, on or before the first Monday of November, 1912, or the bill will be taken pro confesso against them.

THOMAS ALEXANDER, *Clerk.*

Bill of Complaint.

District Court of the United States for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
against

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

3 The Journal of Commerce & Commercial Bulletin, a corporation organized and existing under and by virtue of the laws of the State of New York, as the owner and publisher of a newspaper known as The Journal of Commerce & Commercial Bulletin, published in the City of New York and elsewhere, brings this, its bill of complaint, against Frank H. Hitchcock, who is the Postmaster General of the United States of America; George W. Wickersham, who is the Attorney General of the United States of America; Edward M. Morgan, who is the Postmaster of the United States in and for the post office situated in the Borough of Manhattan, in the City of New York, and Henry A. Wise, who is the District Attorney of the United States, for the Southern District of New York, and thereupon your orator alleges and complains and says:

I. That your orator is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said State, and maintains its principal office and place of business at 32 Broadway, in the Borough of Manhattan, City of New York, and in the Southern District of New York; that your orator was incorporated under the Business Corporation Law of the State of New York on the first day of June, 1893, with an authorized capital stock of \$700,000, divided into 7,000 shares of the par value of \$100 each, of which 6,000 shares of the par value of \$600,000 is common stock and 1,000 shares of the par value of \$100,000 is preferred stock, and all of which is now issued and outstanding.

4 II. That your orator is engaged in the business of publishing a newspaper known as The Journal of Commerce & Commercial Bulletin, which newspaper is published daily in the City of New York, Southern District of New York, and elsewhere throughout the United States of America.

That your orator is also engaged in the business of publishing a weekly paper known as "The Review," which paper is published weekly in the City of New York and elsewhere throughout the United States.

III. That your orator has invested in its business of newspaper publishing large sums of money in printing presses, appliances and equipment, and has invested therein large sums of money and cash capital for the establishment and operation of its business, aggregating greatly in excess of the sum of \$1,000,000.

IV. That your orator has issued and outstanding mortgage bonds secured by mortgage upon all or some of its said properties and has likewise issued and now has outstanding other obligations and securities.

V. That by reason of complainant's business methods and by reason of the character of said newspaper, such newspaper is well and favorably regarded as a newspaper by the general public in the City of New York and throughout the country, and your orator has acquired for such newspaper a large and extensive circulation and has achieved for said newspaper in the City of New York, a wide and favorable reputation as an advertising medium; that by reason of such reputation complainant has obtained a very valuable and highly profitable business in publishing advertisements in its said newspaper and complainant's business of newspaper publishing depends for its profits very largely upon the revenue derived from its advertising patronage.

5 VI. That your orator in the publishing and circulating of its said newspaper daily sends through the mail many thousands of copies of its said newspaper to the readers thereof and subscribers thereto and others, and pursuant to the postal laws of the United States, has had said newspaper entered at the post office in the Borough of Manhattan, City of New York, as second class mail matter and daily sends said copies of its newspaper to its subscribers and others as mail of the second class within the meaning and operation of the postal laws and of the regulations relating thereto.

That your orator depends and relies upon the mail as a means of so circulating and publishing its newspaper to many of its subscribers and others who daily purchase and read the same and without the use of the mails your orator would be unable to circulate its newspaper and unable to deliver the same to its subscribers and others and to the general public, and would be put to such inconvenience and trouble and caused such delay in the delivery thereof, that said newspapers would not be received by such subscribers and others within a reasonable time after the respective days of the issue thereof, and in fact, would not be received until after such a lapse of time as to make said daily newspapers valueless to the subscribers thereto; that the denial of the use of the mails to your orator for the circulating of its newspaper would result in the entire loss of its subscription list and would result in the loss in the annual sales of many thousands of copies of said newspaper and would cause serious injury to the reputation of the paper, would seriously curtail and hamper its business and increase the expense thereof and the expense of

circulating said paper, all of which would cause a falling off in its advertising patronage and a decrease in the returns thereof, and would cause a loss in the profits of its business and its said business of newspaper publishing would be irreparably impaired and injured.

VII. That the denial of the use of the mail to your orator for the circulating of its newspaper would result in serious inconveniences to thousands of leading business concerns in all parts of the country and in almost every branch of trade, for the reason that the information supplied by your orator is of great importance and to deprive the subscribers to its newspaper and others who daily purchase and read the same of such information, would in numerous cases, cause much loss and injury. The importer and the exporter would be deprived of the information supplied as to inward and outward manifests of vessels, giving details of cargoes brought to and fro; insurance companies would lose the use of the fire record published in the newspaper of your orator, which is conceded to be the most exhaustive compilation of its kind published and is generally considered an important factor in the daily conduct of insurance business; dry goods merchants would be deprived of the daily reports published in the newspaper of your orator; dealers in country produce who contract for their product on a basis of prices quoted in the newspaper published by your orator on the day of delivery, would be thrown into much confusion; wholesale grocers who have for years depended upon the reports and quotations published in the newspaper of your orator on staple products would be seriously embarrassed; purchasers and sellers of iron, steel, copper, lead, etc., would lose the reports upon which they daily depend; bankers and investors who look to the newspaper published by your orator for special information would be deprived of this information and many other lines of trade and commerce, individuals and business houses in all parts of the country, would be deprived of what to them is a positive necessity in the way of information which is now supplied to them by the newspaper published by your orator. That the denial of the privileges of the mail to the newspaper published by your orator would not only inflict an injury upon it, but would also embarrass and deprive the business public of the use of a valuable instrument in their business affairs.

VIII. That said weekly paper "The Review," published by your orator, is a publication devoted to the publication of insurance news and that by reason of your orator's business methods and by reason of the character of said weekly paper, such paper is well and favorably regarded as a newspaper by the general public in the City of New York, and throughout the United States, and your orator has acquired for such paper a large and extensive circulation and has achieved for such paper a wide and favorable reputation as an advertising medium, and has obtained a very valuable and highly profitable business in publishing advertisements therein, and your orator depends very largely for its profits from said paper upon its advertising patronage. That your orator circulates said paper, and weekly sends many copies of said paper to its subscribers, through

the mail, having entered said paper at the Post Office in the Borough of Manhattan, City of New York, as second class mail matter. That the enforcement of the legislative enactment hereinafter set forth and the denial of the use of the mails to your orator will likewise cause great and serious injury to the business of your orator and cause the loss of the entire subscription list of said paper

8 "The Review" and cause great loss in its advertising patronage and your orator would suffer irreparable injury.

IX. That in addition to the newspaper of your orator upwards of 25,000 newspapers, magazines and periodicals are published in and throughout the United States of America, each of which is doing a large and thriving business and together the owners thereof have made investments in the United States of America of cash capital aggregating many millions of dollars and each and all thereof are equally affected by the legislative enactment hereinafter set forth.

X. That the following Act was passed by the Senate and House of Representatives of the United States of America in Congress assembled on or about the 24th day of August, 1912, and became a law of the United States of America on or about said day, with the approval of the President of said United States, to wit:

"(Public No. 336.)

"(H. R. 21279.)

"An Act Making Appropriations for the Service of the Post Office Department for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Thirteen, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows * * *

9 "SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided, further, That it shall not be necessary to include in such statement the names of persons owning less

than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

10 "That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

XI. Your orator represents that said Act and so much thereof as is set out in paragraph "X" hereof, is unconstitutional and void and of no effect whatever; that it violates the Constitution of the United States and particularly the First and Fifth Amendments thereto, for the reason that it deprives your orator of liberty and property without due process of law, deprives your orator of and denies to him the equal protection of the laws and abridges the freedom of the press.

XII. That in and by said law, it is provided that your orator and other newspaper publishers and owners shall file and publish to the world, statements of the circulation of its and their publications, i. e., the average of the number of copies of each issue of such publication sold or distributed to paid subscribers; that your orator has never disclosed the circulation of its said publications to the public or to the officials of the Government of the United States (except in so far as necessary to secure entry of said newspaper and said weekly as second class matter) or to any person or persons other than its officers, directors, stockholders and other persons directly inter-

11 terested in its business and entitled by reason of such interests to such information; that your orator does not trade or rely upon its circulation or the number of paid subscribers it has for its papers, in conducting its business or in soliciting advertisements therefor or subscriptions thereto, but the business of your orator has been built up upon the trade name, reputation and character of such newspaper and such weekly and upon the class of news and information published therein, your orator's newspaper being well known and enjoying a high reputation for its publication of news and other matter relating to financial and business affairs and conditions, and its weekly being well known and enjoying a similarly high reputation for its publication of insurance news; that neither the United States of America nor the Post Office Department thereof, nor the officials thereof, nor the public at large, have any interest in knowing or having furnished or published to it or them the circulation of the complainant's publications or the average of the number of paid subscribers to either thereof for the six months preceding the first

day of October, 1912, nor for any other period, nor is said information or a statement thereof material or necessary to aid or assist in the operation of the Post Office Department or in the carrying of the mails or in the regulation thereof, nor does the same have anything to do with or bear any relation to the regulation of the mails or the carrying of mail matter of the second class.

XIII. That in and by said Act and the sections thereof hereinbefore set forth, it is provided that your orator and other newspaper owners and publishers and the owners and publishers of other publications, shall file with the Postmaster General in the Post

12 Office at which the publication of your orator is entered, a statement, not later than the first day of October, 1912, setting forth the post office addresses of the editor and managing editor, publishers, business managers and owners of your orator's papers and in addition the stockholders of your orator and their addresses, and the names and addresses of known bondholders, mortgagees or other security holders, holding or owning bonds, mortgages or other securities and obligations issued by your orator; that your orator has never disclosed the information so called for except the names and addresses of the owner, editor, managing editor, publisher and business manager of its papers, to the Government of the United States or any department thereof, or official therein, or the public at large, but has always treated and regarded the same as private information relating to its own private business affairs and has refused at all times to furnish statements thereof, except to its officers, directors and stockholders and others interested therein and by reason thereof entitled to such information; that neither the giving of such information nor the filing of statements thereof with the Postmaster General or the Postmaster at the Post Office in the City of New York, nor the publication thereof by your orator in its said newspaper or weekly in the second issue of such newspaper or weekly printed next after the filing of such statement, or in any other issue, will be of any material benefit or advantage to the Government or to any department thereof, or official therein, or to the public at large, nor will the same aid or assist in the operation or management of the said Post Office

13 Department or in the regulation of the mails, nor does the same bear any relation to the regulation of the mails or the carrying of mail matter of the second class.

XIV. That in and by the provisions of said Act as hereinbefore set forth, it is provided that all editorial or other reading matter published in the newspaper or weekly of your orator or in any other newspaper, magazine or periodical for the publication of which money or other valuable consideration is paid, accepted or promised, shall be plainly marked "advertisement" and for failure to so mark any such matter for which compensation is paid, accepted or promised, the editors or publishers of your orator's papers, shall, upon conviction, be fined not less than \$50 nor more than \$500. That your orator does not publish in its said newspaper or weekly any advertisements as editorial or reading matter, but it does publish in its said newspaper reading notices and other reading comment, criticisms or reviews, for which either directly or indirectly some valuable consideration is frequently paid, accepted or promised, and

some or all of which are not marked "advertisement;" that all such matters are matters of business arrangement or of favor or otherwise between your orator and its advertisers, or other person by whom the consideration directly or indirectly is promised or paid, or from whom it is accepted; and said Act in so far as it prohibits the publication of any such matter and provides for penalties for violation by such publication has no relation to the operation or regulation of the mails and such provision of said Act is not necessary or proper to assist the Government of the United States or any department or official thereof to carry out or perform any power or duty entrusted or granted to the United States by the several States under and by the Federal Constitution or otherwise.

14 XV. That in and by said Act and the section thereof hereinafter set forth, it is the duty of the defendant Hitchcock as such Postmaster General and of the defendant Morgan as Postmaster, to enforce the operation thereof by furnishing blanks for the rendering of the required statements and by sending to your orator and other newspaper owners notices of his or their failure or neglect to comply with the provisions of said section in the respects aforesaid, and to deny to your orator, or to any other newspaper owner the use of the mails at the expiration of ten days after the sending of such notice by registered mail, if such law is not complied with by your orator or other newspaper owners within said ten days, and your orator alleges that the said Hitchcock as Postmaster General and the said Morgan as Postmaster are threatening to and are enforcing said law against your orator and other newspaper owners and publishers, and have sent to your orator blanks for the making of the aforesaid statements and demanded from your orator that it make and file such statements under such law. That your orator has failed and refused to comply with the provisions of said law and the said Hitchcock as Postmaster General and the said Morgan as Postmaster are threatening, and are about to enforce said law against your orator by sending to your orator by registered mail notice of such failure, and by denying to your orator within ten days after the sending of such notice the use of the mails for its newspaper and weekly, or for any other purpose whatsoever, unless within said ten days your orator shall comply with said law.

XVI. That the defendant Wickersham as Attorney General and the defendant Wise as District Attorney are threatening to
15 enforce and are about to enforce the provisions of said Act prohibiting the publication of any editorial or reading matter in your orator's newspaper, for which money or other valuable consideration is paid, accepted or promised without plainly marking the same "advertisement," and the said Wickersham as Attorney General and the said Wise as District Attorney are threatening to and are about to commence, and under and by reason of said Act, it is their duty to commence against your orator criminal prosecution to recover from your orator fines and penalties in accordance with the provisions of said Act, and your orator will thereby be subjected to a multiplicity of suits and prosecutions and its property will be taken and dissipated by fines, and it will suffer irreparable injury.

XVII. That under and by virtue of the Constitution of the United

States, and particularly of the First and Fifth Amendments thereto, your orator is entitled to the free and uninterrupted use of its property without restraint and is entitled to the same use and enjoyment of its property as any other citizen of the United States of America, and to conduct its lawful business and to operate and use its property in connection therewith in such manner as it may see fit; and your orator is entitled to the privileges of the mail and to use the mail in connection with its said business equally with each and every other citizen of the United States of America, provided that in so doing it does not offend against the peace, health, morals or welfare of the community, and is likewise entitled to the privileges of the mail and the use of the mail in connection with the publishing and circulating of its said newspaper and of its said weekly, and any law which denies to your orator the privileges of the mail for its

16 said papers and confiscates the property of your orator by way of fines or penalties solely by reason of its refusal or neglect to disclose to the postal authorities or to the public, its private information regarding its private, financial and business affairs or by reason of its refusal to label "advertisement" certain matters published in its newspaper, such matters being in no wise improper or tending to injuriously affect the health, morals or welfare of the community, deprives your orator of its property without due process of law and discriminates against your orator to the advantage and benefit of other corporations and persons, citizens of the United States of America, and denies to your orator the equal protection of the laws and abridges the freedom of the press, and is in violation of the provisions of the First and Fifth Amendments of the Constitution of the United States, and the aforesaid Act is for the foregoing reasons in violation of said provisions of the First and Fifth Amendments of the Constitution of the United States, and is void.

XVIII. That in and by the First Amendment to the Constitution of the United States each and every citizen is guaranteed liberty of speech and freedom of the press and any law that subjects the editor or publisher of a newspaper to fine or fines for refusal or neglect to plainly mark "advertisement" any or all editorial or other reading matter published in such paper for the publication of which money or other valuable consideration is paid, accepted or promised is an abridgment of the liberty of the press and in violation of the First Amendment to the Constitution of the United States and the aforesaid provisions of said Act are for the foregoing reasons in violation of said provisions of the First Amendment to the Constitution of the United States and are void.

17 XIX. That said Act and particularly so much thereof as prohibits the publication of and provides for fines for the publication of any editorial or other reading matter for which any money or other valuable consideration is paid, accepted or promised without plainly marking the same "advertisement" is void and of no effect, is not within the power of Congress to enact and is an usurpation by Congress of powers expressly reserved to the several States and is legislation affecting matters with which the several States of the United States alone have the right to treat by legislation or otherwise.

XX. That it is absolutely necessary for the reasonable, quiet and proper enjoyment of its property and the carrying on of its business of newspaper publishing, that your orator should be permitted to continue the use of the mails, and that if it be denied the privileges of the mail and the use thereof, its publishing plant and business will be ruined and its property thereby rendered worthless and of no value and irreparable injury will be done to it, and your orator will have, and now has, as it is advised by counsel and avers and claims, no adequate remedy at law, and that as your orator is advised by counsel and avers and claims, there is no remedy except in equity to test adequately and completely the said Act, and that in the absence of such remedy in equity the penalties in said Act would be unreasonable and confiscatory, and would deprive your orator of its liberty and property without due process of law and would likewise deny to it the equal protection of the laws and would abridge the freedom of the press, in contravention of the First and Fifth Amendments of the Constitution of the United States, on which account your orator invokes the jurisdiction of this Court to protect it against the aforesaid threatened invasion by the defendants of its inherent rights under and guaranteed by the Constitution of the United States.

XXI. That the business of your orator, which will be impaired by the threatened acts of the defendants, as hereinbefore stated, is of very great value, and the value of such business and the property invested by your orator in said newspaper publishing business which will be impaired and destroyed by the threatened acts of the defendants, is upwards of \$1,000,000, and the amount involved in this suit is more than \$3,000.

To the end, therefore, that your orator may have the relief which it can only obtain in a court of equity, and that the defendants may each answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, who now prays:

1. That it be adjudged and decreed that the sections and provisions of said Act, more fully and at length set forth in paragraph "X" hereof, are illegal and void because beyond the power of Congress to enact and because in contravention of the First and Fifth Amendments to the Constitution of the United States as aforesaid, in that such provisions of said Act deprive your orator of liberty and property without due process of law, deny to your orator the equal protection of the laws, and abridge the freedom of the press.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injuries which would result from the threatened enforcement of such provisions of said Act, and that such injuries would be irreparable.

3. That it be adjudged and decreed that your orator be granted writs issuing out of and under the seal of this Honorable Court against the defendants herein named, restraining them, and each of them, and any and all persons acting through or under them, and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the said Act or any of the provisions thereof

against your orator, and that under the provisions of Section 263 of the Judiciary Law of the United States a restraining order may be granted against the defendants, and each of them, and any and all persons acting through or under them, restraining them likewise until your Honorable Court shall determine upon motion and hearing whether a temporary injunction with the like effect, shall not be granted *pendente lite*.

4. That your orator further prays that if at any time hereafter prior to the final hearing hereof any other person or persons shall attempt to enforce the provisions of said Act or otherwise act or proceed thereunder such persons, or some of them on behalf of all, be made parties defendant hereto and each of them enjoined and restrained *and* herein prayed, and that your orator have such other and further or different relief as to the Court may seem just and proper and the nature of the case may require.

5. Your orator further prays that your Honors grant your orator a writ of subpoena de respondendum issuing out of and under the seal of this Honorable Court, to be directed to the said defendants commanding them, and each of them, on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors and this Honorable Court and then and there full, true and direct answer make to all and singular the premises (but not under oath), and further stand, do, perform and abide by such further order and decree as to your Honors may seem meet, and also that a writ of provisional injunction to the same purport, tenor and effect as hereinbefore set forth and appears, be granted during the pendency of this action, and your orator will ever pray, &c.

THE JOURNAL OF COMMERCE &
COMMERCIAL BULLETIN,
By ALFRED W. DODSWORTH,
Secretary.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Counsel for Complainant.

THE UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 9th day of October, 1912, before me personally appeared Alfred W. Dodsworth, to me known and known to me to be the Secretary of the above named The Journal of Commerce and Commercial Bulletin, a New York corporation, who made solemn oath that he is the Secretary of such corporation; that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

[SEAL.]

ALFRED W. DODSWORTH,
MARY F. VAUGHEY,
Notary Public, N. Y. County No. 11.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 9, 1912.

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Notice of Appearance.

In the United States District Court for the Southern District of
New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,

vs.

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York.
Defendants.

To the Clerk of said Court:

Please enter my appearance as solicitor for the defendants Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States, in and for the Southern District of New York, in the above-entitled case

Dated, New York, October 15, 1912.

HENRY A. WISE,
*United States Attorney for the
Southern District of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 15,
1912.

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Demurrer.

In the United States District Court for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
vs.

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Joint and several demurrers of Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, defendants, to the bill of complaint of the Journal of Commerce & Commercial Bulletin, complainant.

The above-named defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

- (1) That the said complainant has not in and by said bill of complaint made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against these defendants;
- (2) That the said complainant has not in and by said bill of complaint exhibited such a cause as entitles it in a court of equity to any relief against these defendants, or any of them, as to the matters contained in the said petition, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said bill of complaint and to all matters and things therein contained, and pray the judgment of this Honorable Court whether they or any of them shall be compelled to make any further or other answer to the said bill of complaint or any of the matters or things therein

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contained, and do further pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

Dated, New York, October 15, 1912.

HENRY A. WISE,
*United States Attorney for the
Southern District of New York,
Solicitor for Defendants.*

HENRY A. WISE,
Of Counsel.

24 IN THE STATE OF NEW YORK,
County of New York, ss:

Henry A. Wise, being duly sworn, says, that he is one of the defendants named in the bill of complaint herein, and that the foregoing demurrer is not interposed for the purpose of any delay.

HENRY A. WISE.

Subscribed and sworn to before me this 15 day of October, 1912.

FREDERICK D. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY A. WISE,
Solicitor for Defendants.

25 *Decree.*

In the United States District Court for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
vs.

FRANK H. HITCHCOCK, as Postmaster-General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post-Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

This cause came on to be heard at the October Term of this Court, 1912, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed, that the demurrer to the bill of complaint herein be and the same hereby is sustained, upon the ground that the said complainant has not, in and by the said bill of complaint, made or stated any such cause as does or ought to en-

title it to any such discovery or relief as is thereby sought and prayed for from or against the defendants, or any of them, and that the said bill of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk of this Court.

Dated, this 15 day of October, 1912.

(Sgd.)

LEARNED HAND,
*Judge of the United States District Court
for the Southern District of New York.*

26

Petition of Appeal.

In the District Court of the United States for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
against

FRANK H. HITCHCOCK, as Postmaster-General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post-Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

To the Judges of the District Court of the United States for the Southern District of New York:

The above named complainant, considering itself aggrieved by the decree made and entered by the above mentioned Court in the above entitled cause, on the 15th day of October, 1912, wherein and whereby it was ordered, adjudged and decreed that the demurrer to the bill of complaint herein be sustained and this cause be dismissed, does hereby appeal from said order and decree to the United States Supreme Court, for the reasons specified in the assignment of errors which is filed herewith; and complainant prays that this appeal may be allowed, and that a transcript of the record and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 15th, 1912.

MORRIS & PLANTE,
Solicitors for Complainant.

27

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed
Oct. 16, 1912.

Order Allowing Appeal.

In the District Court of the United States for the Southern District
of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Com-
plainant,
against

FRANK H. HITCHCOCK, as Postmaster General of the United
States of America; George W. Wickersham, as Attorney-General
of the United States of America; Edward M. Morgan, as Post-
master of the United States of America in and for New York City,
Borough of Manhattan, Post-office; and Henry A. Wise, as Dis-
trict Attorney of the United States in and for the Southern District
of New York, Defendants.

On motion of Messrs. Morris & Plante, solicitors for complainant,
it is

Ordered that the appeal to the Supreme Court of the United States
from the final decree filed and entered herein on the 15th day of
October, 1912, be and the same hereby is allowed; and that a cer-
tified transcript of the record and all proceedings herein be forthwith
transmitted to the said United States Supreme Court at Washington,
D. C.; and it is further

Ordered that the bond on appeal be fixed at the sum of \$250., the
same to act as a supersedeas bond and also as a bond in costs and
damages on appeal.

Dated, October 15th, 1912.

LEARNED HAND,

*Judge of the District Court of the United States
for the Southern District of New York.*

29 (Endorsed:) U. S. District Court, S. D. of N. Y., Filed
Oct. 16, 1912.

30

Assignments of Error.

In the District Court of the United States for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Complainant,
against

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post-office; and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Comes now the complainant and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by this Honorable Court on the 15th day of October, 1912, in the above-entitled cause:

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint, and holding that the said bill was without equity.

Second. That the Court erred in not decreeing that the following sections and provisions thereof of the Act of Congress of August 24th, 1912, entitled, "An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes", to-wit:

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other

securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement'. Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

were unconstitutional and void, and that said sections and the provisions thereof were violative of Articles I and V of the Amendments to the Constitution of the United States; and that the same were and are illegal and void enactments and beyond the legislative power of Congress.

Third. That the Court erred in not decreeing that the complaint was entitled to the relief prayed for.

Fourth. That the Court erred in dismissing said bill with costs.

32 Wherefore the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such disposition may be made thereof, as in accordance with law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

Dated, New York, October 15th, 1912.

MORRIS & PLANTE,
Solicitors for Complainant.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 16, 1912.

33

Bond.

United States District Court, Southern District of New York.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN, Complainant,
against

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Know all men by these presents, that we, The Journal of Commerce and Commercial Bulletin as Principal and the American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, lawfully transacting business and having an office at No. 84 Williams Street, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney-General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, in the sum of two hundred and fifty (\$250) dollars, lawful money of the United States of America, to be paid to the said Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney-General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, their heirs, executors, administrators or assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 16th day of October, 1912.

Whereas, The Journal of Commerce and Commercial Bulletin has appealed to the United States Supreme Court from the decree of the District Court of the United States for the Southern District of New York, bearing date the 15th day of October, 1912, in a suit in which The Journal of Commerce and Commercial Bulletin is Complainant and Frank H. Hitchcock as Postmaster General of the United States of America, George W. Wickersham as Attorney-General of the United States of America, Edward M. Morgan as Postmaster of the United States of America, in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern Dis-

trict of New York, are defendants which said decree sustained the demurrer of the defendants, and

Whereas, the said The Journal of Commerce and Commercial Bulletin desire during the progress of said appeal to stay the execution of the said decree of the said District Court.

34 Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained and shall abide by and perform whatever decree may be made by the said United States Supreme Court in this case or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall remain in full force and effect.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,

By JOHN W. DODSWORTH, *President*.

Attest:

[SEAL.] ALFRED W. DODSWORTH, *Secretary*.

AMERICAN BONDING COMPANY OF BALTIMORE,

By FRANK C. THOMPSON,
Resident Vice-President.

Attest,

[SEAL.] IRA L. ANDERSON,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 16th day of October, 1912, before me personally came John W. Dodsworth, to me known, who being by me duly sworn did depose and say that he resides in the City of New York; that he is the President of The Journal of Commerce and Commercial Bulletin, the corporation described in and which executed the within instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order. And the said John W. Dodsworth further said that he was acquainted with Alfred W. Dodsworth and knew him to be the secretary of said The Journal of Commerce and Commercial Bulletin; that the signature of said Alfred W. Dodsworth subscribed to the within instrument is the genuine handwriting of the said Alfred W. Dodsworth, and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said John W. Dodsworth.

SAMUEL G. NICHOL,

Notary Public, Kings County, N. Y.

Certificate filed in New York County. Commission expires March 30, 1913.

35

Copy.

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On Oct. 16, 1912, before me personally came Frank C. Thompson, to me known, who being by me duly sworn, did depose and say that he resides in the City of New York, that he is the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided by law. And the said Frank C. Thompson further said that he was acquainted with Ira L. Anderson and knew him to be the Resident Assistant Secretary of said Company; that the signature of said Resident Assistant Secretary subscribed to the within instrument is the genuine handwriting of the said Resident Assistant Secretary and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said Frank C. Thompson.

[SEAL.]

EDWARD F. HEALEY,
Notary Public, New York County.

Cert. filed in New York, Queens, Richmond, Westchester & Nassau Cos.

Extracts from Charter of the American Bonding Company of Baltimore.

Home Office, Baltimore, Md.

"Extract from the Minutes of a Meeting of the Board of Directors of American Bonding Company of Baltimore, Held at the Office of the Company at Baltimore, Maryland, on the 9th Day of July, A. D. 1912.

At a regular meeting of the Board of Directors of the American Bonding Company of Baltimore, held in the office of the Company at Baltimore, Maryland, on the 9th day of July A. D. 1912, the following resolution was adopted:

Resolved, that John A. Griffin, Benj. F. Cator, Norman J. Litts, Jas. T. Wilson and Frank C. Thompson of the City of New York, New York, be and hereby are appointed resident Vice-Presidents of this Company at New York, N. Y., and each of them is hereby authorized and empowered to execute and deliver and attach the seal of the Company to any and all Bonds and Undertakings for and on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust, and guaranteeing the performance of contracts, other than Insurance Policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed or required; such guarantee, bond or undertakings, however, to be attested in

every instance by one of the following named persons: Harry L. Callanan, or Edw. F. Healey or Wallace Stevens or Ira L. Anderson or Raymond Warner or Frank J. Hoey or Rupert Kavanagh who are hereby appointed Resident Assistant Secretaries of this Company at New York City, N. Y., and either of said Resident Assistant Secretaries shall also have the right to attest any hereinbefore mentioned guarantee, bond or undertaking executed on behalf of the Company by the President or by any Vice-President of the Company.

[Printed across face:] Copy.

I, Ira L. Anderson, Resident Assistant Secretary of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true and correct copy of a resolution of the Board of Directors of the American Bonding Company of Baltimore, and is the whole of said resolution.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the American Bonding Company of Baltimore, at the City of New York, N. Y.

Oct. 16, 1912.

[SEAL.]

IRA L. ANDERSON,
Resident Assistant Secretary.

Statement of the Financial Condition of the American Bonding Company of Baltimore at the Close of Business, June 30, 1912.

Assets.

United States Government Bonds.....	\$51,000.00
State and Municipal Bonds.....	658,403.00
Railroad Bonds	1,104,723.75
Street Railway and Other Bonds.....	156,392.50
Railroad, Bank and Other Stocks.....	61,575.00
	<hr/>
	\$2,032,094.25
Outstanding Premiums, less Commissions.....	363,522.38
Real Estate	125,646.77
Interest Accrued	15,201.95
Cash in Office and Depositories.....	316,501.04
	<hr/>
	\$2,852,966.39

Liabilities.

Legal Reserve	\$792,970.55
Reserve for Losses and Contingencies.....	408,451.07
Reserve for Taxes and Expenses (Payable 1912)....	6,416.60
Due for Reinsurance, Return and Advance Premiums	29,318.01
Capital Stock	\$750,000.00
Surplus	765,810.16
	<hr/>
Surplus to Policyholders.....	1,615,810.16

\$2,852,966.39

[SEAL.]

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, Frank C. Thompson, Resident Vice-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of said Company at the Close of Business, June 30, 1912.

In testimony whereof, I hereunto set my hand and affix the seal of the Company Oct. 16, 1912.

FRANK C. THOMPSON,
Resident Vice-President.

Subscribed and sworn to before me Oct. 16, 1912.

[SEAL.]

EDWARD F. HEALEY,
Notary Public, New York County.

Cert. filed in New York, Queens, Richmond, Westchester & Nassau Cos.

Copy.

36 The within undertaking is approved as to form and as to the sufficiency of the surety.

LEARNED HAND, D. J.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 16, 1912.

37 The President of the United States of America, to Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the States; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of New York, on the 15th day of October, 1912, and filed in the Clerk's office of said Court on the 16th day of October, 1912, in a cause wherein The Journal of Commerce & Commercial Bulletin is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be granted and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 16th day of October, A. D. 1912.

LEARNED HAND,
*United States District Judge for the
 Southern District of New York.*

38 [Endorsed:] Eq. 367. Eq. & A. D. 3448. Eq. 367.

United States District Court, Southern District of New York. The Journal of Commerce & Commercial Bulletin, Appellant, against Frank H. Hitchcock, as Postmaster, etc., and others, Defendants. (Original.) Citation. Morris & Plante, Solicitors for Appellant, 135 Broadway, New York. U. S. District Court, S. D. of N. Y. Filed Oct. 16, 1912, — M. [Illegible.]

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant-Appellant,

vs.

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants-Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this Sixteenth day of October, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the said United States the one hundred and thirty-seventh.

ALEX. GILCHRIST, JR., *Clerk.*

[Seal District Court of the United States, Southern District of N. Y.]

[Endorsed:] Supreme Court of the U. S. The Journal of Commerce & Commercial Bulletin, Complainant-Appellant, vs. Frank H. Hitchcock, as Postmaster General of the United States, et al., Defendants-Appellees. Transcript of Record. Appeal from the District Court of the United States, For the Southern District of New York.

Endorsed on cover: File No. 23,393. S. New York D. C. U. S. Term No. 818. The Journal of Commerce & Commercial Bulletin, appellant, vs. Frank H. Hitchcock, as Postmaster General of the United States; George W. Wickersham, as Attorney General of the United States, et al. Filed October 17th, 1912. File No. 23,393.

5

Office Supreme Court, U. S.
FILED.

OCT 19 1912

JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL
BULLETIN,

Appellant,
against

FRANK H. HITCHCOCK, as Postmaster General
of the United States of America, GEORGE W.
WICKERSHAM, as Attorney General of the
United States of America, EDWARD M.
MORGAN, as Postmaster of the United States
of America, in and for New York City,
Borough of Manhattan Post Office, and
HENRY A. WIER, as District Attorney of the
United States, in and for the Southern
District of New York,

Appellants.

No. 512.

October Term, 1912.

MOTION TO ADVANCE.

ROBERT C. MORRIS,

GUTHRIE B. PLANT,

Of Counsel for Appellants.

Supreme Court of the United States.

THE JOURNAL OF COMMERCE AND
COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster
General of the United States of
America, GEORGE W. WICKER-
SHAM, as Attorney General of the
United States of America, ED-
WARD M. MORGAN, as Postmaster
of the United States of America,
in and for New York City, Bor-
ough of Manhattan Post Office,
and HENRY A. WISE, as District
Attorney of the United States, in
and for the Southern District of
New York,

Appellees.

No. 818.
October Term, 1912.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK.

MOTION TO ADVANCE APPEAL.

The appellant above named respectfully moves to advance this cause and to set the same for argument at the earliest date convenient to the Court.

The Solicitor General on behalf of the United States joins in this motion to advance.

The matter involved briefly stated is as follows :

By an Act of Congress of August 24th, 1912, entitled "An Act Making appropriations for the service of the Post Office

Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," it is provided

" SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and postoffice addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation ; and also the names of known bondholders, mortgagees, or other security holders ; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months : *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications : *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so

marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

The appellant, the publisher of a daily newspaper known as "The Journal of Commerce & Commercial Bulletin" and of a weekly paper known as "The Review," brought this cause in the District Court to have the sections of the law quoted above declared unconstitutional and void, because in violation of Articles I. and V. of the Constitution of the United States, as taking property without due process of law, denying to appellant the equal protection of the law, and abridging the freedom of the press and because the same are illegal and void enactments beyond the power of Congress.

It is contended by appellant that the sections complained of bear no relation to the regulation of the mails, are not designed for the purpose of preventing the sending through the mails of obscene or other objectionable matter injurious to the morals or welfare of the public, but are unreasonable provisions intended to require the owners of the described publications to disclose their private business and financial information to the government and the public not for any proper governmental purpose, but as a matter of general public information.

Likewise it is contended that the law in so far as it dictates to the publisher what shall or shall not be published in his paper, and the form in which certain matters shall be published, abridges the freedom of the press.

That the provision of the law imposing fines for the publication as editorial comment or news of any matter for which any valuable consideration is paid, accepted or promised, without plainly marking the same "advertisement," applies equally whether the publication be sent through the mails or is published and circulated only within the confines of a State without the use of the mail, and that it is, therefore, beyond the power of Congress; that if such acts can be declared a crime and the subject of punishment by fine or other penalty they can only be so declared by the several States.

It is also contended by appellant that to it the use of the mail is a matter of legal and common right; that it is entitled to use the mail in connection with the publication of its said

paper or its other business, equally with every other citizen, and that it cannot be deprived of that right unless the matter sent through the mails and otherwise mailable offends against the peace, health, morals or welfare of the community.

It is set forth in the bill of complaint that appellant, as do other publishers, daily sends through the mail many thousands of copies of its said papers to its subscribers, and that without the use of the mail as a means of so circulating and publishing its newspapers, appellant would be unable to circulate its newspaper and unable to deliver the same to its subscribers and others, and to the general public, and would be put to such inconvenience and trouble and caused such delay in the delivery thereof, that said newspapers would not be received by the subscribers and others within a reasonable time after the respective times of the issue thereof, and, in fact, would not be received until after such a lapse of time as to make said daily newspapers valueless to the subscribers thereto. That the denial, therefore, of the use of the mail to appellant for the circulating of its newspaper and of its weekly, would result in the entire loss of its subscription lists and in the loss in the annual sales of many thousands of copies of such papers, would cause serious injury to the reputation of the papers, seriously curtail and hamper appellant's business and increase the expense thereof and the expense of circulating said paper. This would in turn cause a falling off in its advertising patronage upon which its profits largely depend, and thus cause a loss in the profits of its business, and its business of newspaper publishing would be irreparably impaired and injured.

It is respectfully submitted that a public question of great importance is presented, which vitally affects the owners and publishers of upwards of twenty-five thousand publications, as publishers who refuse or neglect to comply with the sections of the act here questioned will be denied the use of the mail for any purpose whatsoever and will be subjected to multiplicity of prosecutions. They will be without redress if the Court should subsequently determine said enactment to be unconstitutional and void, and likewise appellant in the event of such a decision by this Court would be denied the benefit thereof to which it would be entitled.

The bill of complaint was filed on the 9th day of October, 1912, and the demurrer of the defendants and the decree

thereon, dismissing the bill, were filed October 15th, 1912. Appellant has caused this appeal to be perfected and the return to be filed with the Clerk and the record will be printed in a few days.

Appellant, therefore, respectfully prays this Court to advance this cause for argument, so that the validity of said act may be finally determined by this Court before irreparable injury is done to appellant and other publishers of newspapers, magazines and periodicals.

Dated New York, October 17th, 1912.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Of Counsel for Appellant.

6
Office Supreme Court, U. S.
FILED.

NOV 30 1912

JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 818.

THE JOURNAL OF COMMERCE & COMMERCIAL
BULLETIN,

Appellant,
against

FRANK H. HITCHCOCK, as Postmaster General of the
United States of America, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF OF COUNSEL FOR JOURNAL OF COMMERCE ON CONSTRUCTION OF THE ACT.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,

Counsel for Appellant.



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Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COM-
MERCIAL BULLETIN,

Appellant,

AGAINST

FRANK H. HITCHCOCK, as Post-
master General of the United
States of America, *et al.*,

Appellees.

ARGUMENT UPON THE CONSTRUCTION OF THE ACT OF AUGUST 24th, 1912.

The brief of the Solicitor General contains the wholly unexpected argument that the statute under consideration relates only to *second class* mail matter and should be so construed; that the penalty imposed for failure to file and publish the particular information is not a denial of the privileges of the mail, but a denial of the privileges of the second class mail; and that the penalty for failing to mark paid-for articles "advertisement" can be imposed only in cases where papers containing such violations have been sent through the mails as second class matter. This argument is founded in part upon a so called construction and in part upon a fine metaphysical distinction drawn between "typographical" and "literary" paragraphs.

The argument is without warrant because (a) the language is not susceptible of the construction claimed; (b) the evi-

denced intent of Congress is to the contrary ; (*c*) the construction asked would amount to judicial legislation ; (*d*) the construction of the Attorney General of the United States and of the Postmaster General is to the contrary ; (*e*) the regulation of second class mail is already fully covered by provisions of statutes in no way affected by this Act and the provisions of this Act are not necessary for the purposes for which the Solicitor General contends.

A.

The entire argument of the Solicitor General is based upon an attempted construction by which it is made to appear that compliance with the Act is not required, but is a condition precedent to the granting of second class mail privileges. Not alone impliedly, but actually he concedes in his brief (pp. 21, 48) that if such construction be not made and followed the statute in more than one respect is invalid. The cleverness and boldness with which this argument is advanced almost cause one to lose sight of the false premise upon which it is based and the fallacious assumptions with which it is built up.

The language used is plain and unequivocal. It is not susceptible of any other than its plain meaning. It says unless the publisher does certain things, he shall be denied the privileges of the mail. It does not say he shall be denied the privileges of the second class mail. Second class mail is not mentioned.

The word "mail" has a commonly accepted meaning—
Funk & Wagnalls Standard Dictionary :

"1. The governmental system for conveying and delivering letters, parcels, etc. ; hence restrictively the person or the conveyance that carries such matter, or the bag in which it is placed for conveyance ; 2. Matter in general that is conveyed by post, collectively ;

that which is sent by post at a particular time or by a special route ; as the mail is in."

It has the same meaning in law—

Bouvier's Law Dictionary :

" The bag, valise or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail.

The laws of the United States have provided for the punishment of robberies or wilful injuries to the mail ; the Act of March 3, 1825, 3 Story U. S. Laws 1895."

United States v. Wilson (U. S.), 28 Fed. Cas. 699-771.

" The term " mail " means a bag, valise, or portmanteau used in the conveyance of letters, papers, and packages by any person acting under the authority of the Postmaster General from one post-office to another. Each bag so used is a " mail " of which there may be several in the same vehicle, as the " way mail," the " general mail ", the " letter mail ", or the " newspaper mail "

United States v. Marselis, 26 Fed. Cas. 1167.

" It is employed as embracing the whole body of mailable matter transmitted from office to office, and also the particular packets addressed from and received at different post-offices."

Wynen v. Schappert, 6 Daly (N. Y.) 558, 560.

" The term * * * after the establishment of post-offices, post routes, and post coaches became, as it is now, a general word to express the carriage and delivery of letters by public authority."

United States v. Rapp, 30 Fed. 818, 822.

" 'Mailing' to come within the provisions of Rev. Stat. §§ 5467-5469, must get into the mail in some of the ordinary ways prescribed by the postal authorities, and become fairly and reasonably a part of the mail matter under the control of the postal department."

From these authorities it appears that the word "mail" embraces the entire postal system, the instrumentalities of conveyance and delivery, and the entire body of matter thus conveyed. It applies equally to the sending of matter "first", "second", "third" or "fourth" class. The use of the term imports no limitation and permits of no restriction. It is all embracing in its scope and cannot be confined without the use of words of express limitation such as "first class" mail, "second class" mail, etc.

It is not and cannot be restricted by the use of the word "privileges" for the word is plural and includes all privileges whether of the "first", "second", "third", or "fourth" class. The Solicitor General himself contends that no one has a vested right to use the mails although impliedly admitting that the use when granted or refused must be granted or refused to all alike. Hence, it must be that the use of the mail, no matter the class, is a privilege that Congress in its reasonable discretion may grant or refuse according as the health, happiness or welfare of the public or the service of the department may require. Combined as "privileges of the mail" coupled with the word "denied" the words can mean but the denial of entire postal facilities. And that is exactly what Congress intended.

B.

The Act of August 24th, 1912, is mainly an appropriation Act, but contains other provisions relating to the post office department and the regulation of the mails. Under the head-

ing of "Office of the Third Assistant Postmaster General" it contains an amendment to the Act of March 3, 1879, establishing mail classifications, by providing that certain publications not theretofore entitled to the second class rate shall hereafter be admitted as second class matter and prescribing the conditions that must be shown to exist before the entry as second class matter will be accepted. It did not, however, include the sections here under discussion under the same subdivision, nor did it "hitch" the sections to any other provisions of the Act in any way relating to second class matter, but on the contrary included these provisions under an entirely different sub-heading having no relation to second class mail. Is it not reasonable to suppose that if Congress had intended this to be a provision operating as a condition precedent to the entry of second class matter that it would have included it with the other provisions relating to such class? And is it not to be believed that if Congress had intended these provisions to be conditions precedent it would have plainly said so as it did in the Act of March 3, 1879? *

* Act March 3, 1879.

"Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

"The conditions upon which a publication shall be admitted to the second class are as follows:

FIRST: It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

SECOND: It must be issued from a known office of publication.

THIRD: It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

FOURTH: It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, However, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Here there is nothing to indicate that a publisher must comply with these provisions before entry. On the contrary if not already entered he may enter his paper as second class matter on the 1st day of July or any other day in any year or commence sending it through the mail as first or fourth class matter without the slightest regard for these requirements. Thereafter, however, if on or about October 1st and April 1st in each year he fails to comply with this Act he is denied postal facilities for his publishing business.

Nor does the use of the word entry indicate an intention to limit the operation of the act to second class matter. Congress may have assumed that every publisher entitled so to do would avail himself of the second class rate. Such an assumption would undoubtedly be more nearly correct than the assumption of its Committee that with the purpose of this Act a vast majority of the newspapers and periodical publishers are in *hearty accord*. The word entered is used only for the purpose of designating the postmaster with whom the required statements shall be filed and is not used for the purpose of identifying the persons who shall cause the filing to be made.

Furthermore, the provision regarding the marking of paid articles "advertisement" can have no relation to the mail of any class. The penalty is imposed for "printing" not for mailing. This seems too evident to require discussion.

C.

Any other construction than that we have pointed out requires the reading into the Statute of words that are not now to be found therein and which it must therefore be assumed Congress intended to omit.

In order to give the effect contended by the Solicitor General, this Court is asked to prefix to the paragraphs in question a suitable phrase such as "*before any newspaper, period-*

ical, etc., shall be entitled to be admitted to the second-class mail" and to insert the words "*second-class*" in the expression "*privileges of the mail*" and to insert the words "*and mailing*" after the word "*printing*" in the paragraph relating to advertising matter and to provide the other necessary changes to make the Statute uniform and workable. In other words, judicial legislation is asked—something that this Court has always refused. In

United States v. Reese, 92 U. S. 214,

this Court was asked to hold that legislation in itself sufficiently broad to embrace acts beyond as well as within the constitutional jurisdiction, could yet be held valid and enforceable by judicial construction, so as to make it operate only upon that which Congress could rightfully prohibit and punish. In denying power so to do this Court said (p. 221) :

" We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The Courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the Courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In

Trade Mark Cases, 100 U. S. 82,
this Court in considering a federal statute attempting to regulate and control trademarks generally, said (p. 98) :

" It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these Statutes shall be held valid in that class of cases, if no further. * * * While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the Court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not with the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States v. Reese*, 92 U. S. 214. In that case Congress has passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This Court

was of the opinion that, as regarded the section of the statute under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude.

"It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said" (here follows the above quotation from *U. S. v. Reese, supra*).

In

James v. Bowman, 190 U. S. 127,

the Court in discussing a similar situation, quoted at length from the above cases, saying, page 142 :

"We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested or in which some mandate of the National Constitution is disobeyed and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

Holden v. Stratton, 198 U. S., 202, 210 :

"It is not to be doubted that the broad terms of the statute, as ordinarily understood, embraced both of the policies, and it would not be construction but legislation to restrict the meaning of the statute in accord with narrower legislation in other States, because in the judgment of the Court it might seem equitable to do so."

D.

We have stated that the construction of the Attorney General of the United States and of the Postmaster General is contrary to the views now advanced by the Solicitor General.

To be satisfied on that point one needs but to read the opinion of the Attorney General given to the Postmaster General for the latter's guidance and under and in accordance with which the Postmaster General is proceeding to enforce the Statute. Copies of this opinion have been published and distributed for the guidance of publishers. Such opinion follows :

POST OFFICE DEPARTMENT

OPINION OF THE ATTORNEY GENERAL CONSTRUING A PROVISION OF THE ACT OF AUGUST 24, 1912, REQUIRING NEWSPAPERS TO MAKE CERTAIN RETURNS RESPECTING CIRCULATION, ETC.

DEPARTMENT OF JUSTICE,
WASHINGTON, September 25, 1912.

THE HONORABLE THE POSTMASTER GENERAL :

SIR : In your letter of September 14 you call my attention to certain provisions of section 2 of the act entitled " An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes " (Public, No. 336), approved August 24, 1912, which makes it the duty of the editor, publisher, business manager, or owner of every daily newspaper, to file with the Postmaster General and the postmaster at the office at which such publication is entered, not later than the first day of April and the first day of October in each year, on blanks furnished by the Post Office Department, a sworn statement which shall include—

the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months * * *

a copy of which sworn statement shall be published in the second issue of such newspaper printed next after the filing of such statement, and which publication, it is enacted—

shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

You ask my opinion as to—

Whether or not this statement should be limited to paid individual subscriptions, or shall include purchases in bulk by news agents or others for redistribution; also whether in your opinion the provision covers paid circulation of daily newspapers not distributed through the mails.

The provision is highly penal in its nature, as a consequence of failure to comply with it is punished by denying to the publication the privilege of the mails; not merely the privilege of being carried in the mails as second-class mail matter, but the privilege of being carried in the mails at all. Being, therefore, in derogation of common right, the provision should not be construed to embrace anything more than falls clearly within its terms, and by those terms the requirements of the statement are limited to—

the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months.

The verb “to subscribe” has a definite meaning in both a legal and a popular sense, and is defined as—

To promise a certain sum, verbally or by signing an agreement; specifically, to undertake to pay a definite amount, in a manner or on conditions agreed upon, for a special purpose; as, to subscribe for a newspaper, or for a book (which may be delivered in instalments); * * * In law the word implies that the agreement is made in writing. (Century Dictionary and Cyclopædia.)

Or again :

To engage oneself, or to give ones formal consent, by signing any pledge, contract, deed, document, or written statement of any kind * * * : To pledge oneself, especially by writing

to pay a given amount of money. To authorize the entry of a name on the list of those who agree to receive and pay for an article, as a periodical, an engraving, or a book sold by securing purchasers in advance of delivery. (Standard Dictionary.)

To become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber. (*Ashton v. Story*. 96 Iowa, 197, 201; 64 N. W. Rep., 804.)

Thus, a subscription to the capital stock of a corporation implies an agreement to take and pay for it. But if the steps taken, although informal, are treated by the corporation and the subscriber as sufficient, they will be treated as binding. (*Cressy v. Cook*, 67 Kans., 20, 23; *Nugent v. Supervisors*, 19 Wall., 241.)

The distinction between circulation among paid subscribers, and the casual or uncertain distribution to other purchasers has been recognized by the Post Office Department in its regulations (Ed. 1907, sec. 469), where, after pointing out that the news agent's right to mail second-class publications at the pound rate of postage, under the provisions of the act of March 3, 1885, chapter 342, extends only to actual subscribers thereto, and to other news agents for sale, the regulations state that—

Actual subscribers to second-class publications are persons who personally order the same for a period of at least three consecutive issues.

Subscribers, therefore, are clearly those who have by agreement undertaken to receive and pay for the publication for some specified period of time, as distinguished from casual purchasers who come under no obligation to take and pay for the publication in advance of its delivery. It is immaterial whether this subscription is for one or many copies. Subscriptions may be direct, or through an agent; but the delivery to agents for sale or distribution, unaccompanied by agreement to pay for any definite number, would not be included within the term "subscribers."

With respect to publications seeking the privilege of the second-class mail rate, as shown below, the Postmaster General is required to determine certain matters of fact upon which depends the enjoyment of that privilege, among which is the

question whether or not there is "a legitimate list of subscribers" to the publication. (See 20 Op., 384). But the clause in the act of 1912 under consideration devolves no such duty upon you.

It makes it the duty of the editor, publisher, business manager or owner to file a sworn statement containing among other things the matters above specified, on blanks furnished by the Post Office Department. These blanks should call for the information required by the statute—no more, no less. If the statement is not filed as required by law, or if the information required is not what the statute demands, the publication may be denied the privilege of the mail if it fail to comply with the provisions of the law within 10 days after notice by registered letter of such failure. While the statute does not expressly make it the duty of the Postmaster General to give such notice, yet I think it may be fairly implied from its provisions that it would become his duty to give the notice in all cases where (1) the editor, etc., of any publication of whose existence the Postmaster General has knowledge shall fail to file the statement required by law; or (2) the statement on its face shall not conform to the statute; or (3) information shall be laid before the Postmaster General which satisfies him that the information furnished in the statement is inaccurate or untrue. In either event, if the privileges of the mail should be denied because of failure to comply with the statute, the burden would be on the Government to establish such failure.

The provisions of the statute under consideration should not be confused with those of the statutes relating to second-class mail matter, and they in no respect limit or affect the power of the Postmaster General to require full information to be furnished to him to enable him to determine whether or not a given publication is entitled to the privileges of the second-class mail rate.

The act of March 3, 1879 (R. S., 1st Supp., 246), provides that mailable matter of the second class

shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as

four times a year and are within the conditions named in sections twelve and fourteen.

Among the conditions which by section 14 must be met before a publication is admitted to the privilege of the second class are those of subdivision fourth, namely :

It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers : Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

The act of August 24, 1912, extends the benefits of the second-class mail rate to certain publications to which it has not heretofore been granted. But the provisions of that paragraph, which are found under the head of "Office of the Third Assistant Postmaster General," do not otherwise conflict with the provisions of the act of March 3, 1879, or the amendment to it approved March 3, 1885 (chap. 342), except that with respect to some of the publications issued by or under the auspices of benevolent or fraternal societies or orders, or trades-unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, they are limited

to copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than fifty per centum of the regular subscription price ; to other bona fide subscribers ; to exchanges, and ten per centum of such circulation as sample copies : *Provided further*, Then when such subscribers pay therefor as a part of their dues or assessments individual subscriptions or receipts shall not be required. * * *

Independently of this amending act, in order that the Postmaster General may determine whether or not a publication applying to be admitted to the second class has a legitimate list of subscribers, and is not designed primarily for advertising purposes, or free circulation, or for circulation at nominal rates, the Postmaster General is entitled to require full and complete statements showing the character of the business of

the publication, and by section 436 of the Regulations (Ed. 1902) he has required postmasters to secure satisfactory evidence that publications so offered for entry have

a legitimate list of subscribers approximating 50 per cent. of the number of copies regularly issued and circulated, by mail or otherwise, made up not of persons whose names are furnished by advertisers or by others interested in the circulation of the publication, but of those who voluntarily seek it and pay for it with their own money, although this rule is not intended to interfere with any genuine case where one person subscribes for a definite period of several issues for a limited number of copies for another.

And by section 438, the postmasters are directed to require the proprietor or duly authorized representative, on applying for second-class mail privilege, to furnish detailed information of a character deemed requisite by the Postmaster General to enable him to determine whether or not the publication falls within the requirements of the acts of Congress. **The right of the Postmaster General to exact this information is in no respect impaired or affected by the provisions of the statute under consideration. Those provisions are inserted as a part of the act of 1912, which is apparently designed to insure publicity as to the ownership and control of the publication. This particular clause was inserted by amendment just before the passage of the act, and bears no very ascertainable relation to the subject matter of the paragraph in which it was inserted. It is a provision of statute law which should be complied with to the extent which its language requires, but it should not be extended beyond that language.** (See *Payne v. Railway Pub. Co.*, 20 App. D. C., 581; *People ex rel Opydke v. Brennan*, 39 Barbour, 651.)

Answering specifically your inquiry, therefore, in my opinion, (1) it is immaterial whether or not the subscriptions are individual or in bulk. The statement should include the average of the number of copies of each issue of such publication sold or distributed to all persons who have subscribed; that is, have agreed to take and pay for one or more copies of

the publication for a definite period of time, and have paid for such subscriptions ; and (2) in my opinion, the provision covers the number of copies of such publication distributed to such paid subscribers by any means, whether by the mails or otherwise.

Respectfully,
GEO. W. WICKERSHAM,
Attorney General.

The construction given the Act by the Attorney-General has been adopted by the Postmaster General and as such should not be disturbed unless clearly wrong.

United States v. Philbrick, 120 U. S., 52, 59.

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes, is entitled to great weight ; and since it is not clear that the construction was erroneous, it ought not now to be overturned."

See also,

United States v. Hermanos, 209 U. S. 337.

E.

Finally these provisions were not necessary for the purposes for which the Solicitor General contends. As pointed out by him, some of the matters here required were previously required under the Act of 1879 as conditions precedent to the allowance of the second-class rate.

Congress has not indicated any dissatisfaction with the requirements heretofore and still in force, but shows as expressed solely a desire for publicity as to the internal affairs of newspapers, etc. Hence, the provision for the publication of the statements containing the information.

As it stands today, the Act of 1879 requires among other things that the publisher as a condition to receiving the second

class rate, shall furnish to the postmaster certain of the information required by this Act. Why then the need for repetition as to these matters? One reason alone. To establish a censorship and insure publicity.

Respectfully submitted,

ROBERT C. MORRIS,

GUTHRIE B. PLANTE,

Of Counsel for Appellant.



7
Office Supreme Court, U. S.
FILED.

NOV 18 1912

JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

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No. 818.
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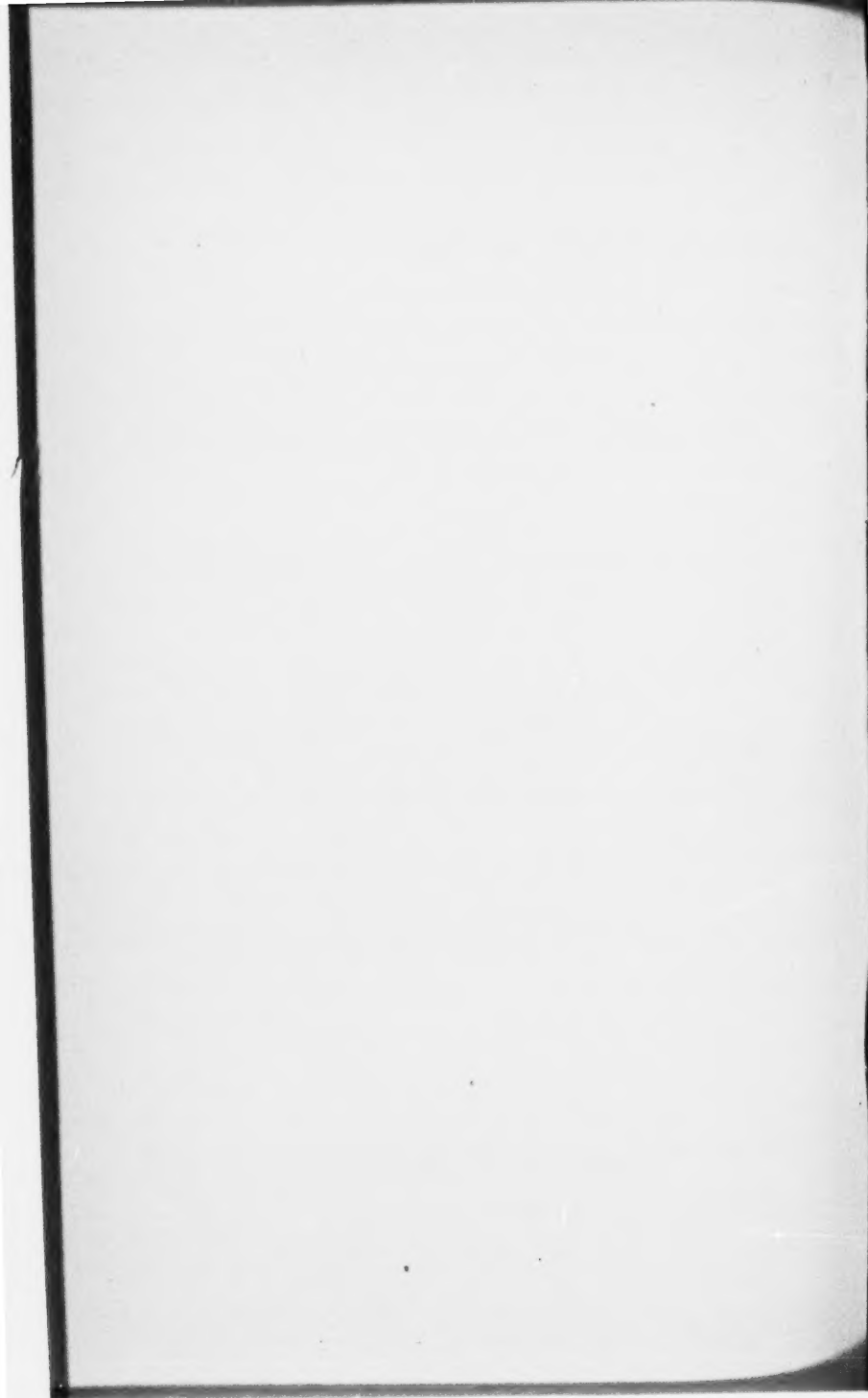
THE JOURNAL OF COMMERCE & COMMERCIAL
BULLETIN,
Appellant,
against

FRANK H. HITCHCOCK, as Postmaster General of the
United States of America, ET AL.,
Appellees.

—
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF COUNSEL FOR APPELLANT.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Counsel for Appellant.



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Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COM-
MERCIAL BULLETIN,

Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster
General of the United States of
America, *et al*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF COUNSEL FOR APPELLANT.

Introductory Statement.

This is an appeal from a final judgment of the District Court for the Southern District of New York, sustaining a demurrer of the defendants to complainant's bill and dismissing the bill with costs.

The action was brought by The Journal of Commerce and Commercial Bulletin as the owner and publisher of the daily newspaper known by the title of "The Journal of Commerce & Commercial Bulletin," and as the owner and publisher of the weekly newspaper known as "The Review," both published in the City of New York and elsewhere throughout the

United States, to have certain paragraphs of an Act of Congress of August 24th, 1912, declared unconstitutional and void and to have the defendants restrained from enforcing such illegal provisions.

The title of the Act and the sections complained of are as follows :

“ AN ACT MAKING APPROPRIATIONS FOR THE SERVICE OF THE POST OFFICE DEPARTMENT FOR THE FISCAL YEAR ENDING JUNE THIRTIETH, NINETEEN HUNDRED AND THIRTEEN, AND FOR OTHER PURPOSES.

“ SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication, to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation ; and also the names of known bondholders, mortgagees or other security holders ; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months : *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications : *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of

this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement'. Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

The facts shown by the bill of complaint, briefly stated are: That The Journal of Commerce & Commercial Bulletin is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, with an authorized capital of \$700,000, and an investment of greatly in excess of the sum of \$1,000,000; that The Journal of Commerce and Commercial Bulletin publishes a daily newspaper known as "The Journal of Commerce & Commercial Bulletin," and a weekly newspaper known as "The Review," both of which are published in the City of New York, Southern District of New York, and elsewhere throughout the United States; that there is an issue of outstanding mortgage bonds secured by mortgage upon all or some of its property, and that there are likewise other obligations and securities outstanding; that by reason of the business methods of The Journal of Commerce and Commercial Bulletin and of the character of the newspapers published by it, such newspapers are well and favorably regarded by the general public, and that such newspapers have a large and extensive circulation and possess a wide and favorable reputation as advertising mediums, and by reason of such reputation said newspapers possess a very valuable and highly profitable business in publishing advertisements, and the business very

largely depends for its profits upon the revenue derived from its advertising patronage.

That in the publishing and circulating of said newspapers many thousands of copies of said newspapers are sent through the mail to the readers thereof and subscribers thereto and others, and The Journal of Commerce and Commercial Bulletin relies upon the mail as a means of so circulating and publishing its newspapers to many of its subscribers and others who purchase and read the same, and without the use of the mails it would be unable to circulate its newspapers and unable to deliver the same to its subscribers and others and to the general public, and without the use of the mail it would be put to such inconvenience and trouble and caused such delay in the delivery thereof that said newspapers would not be received by subscribers and others within a reasonable time after the respective days of the issue thereof, and, in fact, would not be received until after such a lapse of time as to make the newspapers valueless to the subscribers thereto.

That the denial of the use of the mails to it for the circulation of its newspapers would result in the entire loss of its subscription list and would result in a loss in the annual sales of many thousands of copies of said newspapers, and would cause serious injury to the reputation of said newspapers, would seriously curtail and hamper its business and increase the expense thereof and the expense of circulating said paper, all of which would cause a falling off in its advertising patronage and a decrease in the returns thereof and would cause a loss in the profits of its business and its said business of newspaper publishing would be irreparably impaired and injured.

That the denial of the use of the mail to it for the circulating of its newspaper would result in serious inconvenience to thousands of leading business concerns in all parts of the United States and in almost every branch of trade, for the reason that the information supplied by it is of great import-

ance, and to deprive the subscribers to its newspapers and others who daily purchase and read the same of such information would, in numerous cases, cause much loss and injury.

That the denial of the privileges of the mail to the newspapers published by it would not only inflict an injury upon it, but would also embarrass and deprive the business public of the use of valuable instruments in their business affairs.

That in addition to the newspapers published by it, upwards of twenty-five thousand newspapers, magazines and periodicals are published in and throughout the United States, each of which is doing a large and thriving business, and together the owners thereof have made investments in the United States of America of cash capital aggregating many millions of dollars, and each and all thereof are equally affected by the said legislative enactment.

That the Act in question provides that the editor, publisher, business manager or owners of newspapers, magazines or periodicals, shall file with the Postmaster-General and the Postmaster at the office at which said publication is entered, and publish to the world, twice each year, certain statements as to its private business affairs, containing information to which the public is not entitled, under penalty for non-compliance of denial of the privileges of the mail, and that all editorial or other reading matter published in any such newspaper, magazine or periodical, for the publication of which money or other valuable consideration is paid, accepted or promised, shall be plainly marked "advertisement," and failure to do so shall subject the editor or publisher, upon conviction, to a fine of from \$50 to \$500.

That The Journal of Commerce and Commercial Bulletin has never disclosed the information required by the Act as to its stockholders, known bondholders, mortgagees, or other security holders to the government of the United States, or any department thereof, or official therein, or the public at large, but has always treated and regarded the

same as private information relating to its own private business affairs, and has refused at all times to furnish statements thereof, except to its officers, directors and stockholders and others interested therein and by reason thereof entitled to such information ; that it does not publish in its said newspaper or said weekly any advertisements as editorial or reading matter, but it does publish in its said newspaper reading notices and other reading comment, criticisms or reviews, for which either directly or indirectly some valuable consideration is frequently paid, accepted or promised, and some and all of which are not marked "advertisement." That all such matters are matters of business arrangement or of favor or otherwise between it and its advertisers, or other person by whom the consideration, directly or indirectly, is promised or paid or from whom it is accepted, and are of no public concern. That the denial of the privileges of the mail would practically result in ruin to its business, would subject it to a multiplicity of suits and prosecutions, and its property would be taken and dissipated by fines.

Appellant assigns as error on this appeal (Record, pp. 17, 18):

FIRST. That the Court erred in sustaining the demurrer of the defendants to the bill of complaint and in dismissing said bill, in holding that the said bill was without equity.

SECOND. That the Court erred in not decreeing that the sections and provisions of said Act above quoted were unconstitutional and void and that said sections and provisions thereof were violative of Articles I. and V. of the Amendments to the Constitution of the United States and that the same were and are illegal and void enactments and beyond the legislative power of Congress.

THIRD. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for.

FOURTH. That the Court erred in dismissing said bill of complaint with costs.

ARGUMENT.

The assignment of errors filed (Record, pp. 17, 18), present several questions involving objections to the Act that appear upon its face. In brief, these questions are as follows :

(1) That the Act deprives appellant of its liberty and property without due process of law, by compelling appellant to file certain required statements and publish the same to the public at large under penalty for non-compliance of a denial of the privileges of the mail.

(2) That the Act discriminates against appellant to the advantage and benefit of other corporations and persons, citizens of the United States, and denies to appellant the equal protection of the laws by compelling it and other owners of similar publications to file certain required statements and publish the same to the public at large, while not demanding that all other persons or corporations shall be obliged to do the same, under penalty for non-compliance of a denial of the privileges of the mail.

(3) That the Act abridges the freedom of the press by compelling the filing and publication of certain required statements under penalty for non-compliance of a denial of the privileges of the mail, and as it dictates to appellant what shall or shall not be published in its newspapers, and the form in which certain matters shall be published, establishing a governmental control, which is of no material benefit to the government or to the public at large, nor of aid or assistance in the operation or management of the Post-Office Department, nor in the regulation of the mails or the carrying of mail matter.

(4) That the act is illegal and void and beyond the power of Congress to enact, being an usurpation by Congress of powers expressly reserved to the several States of the United States, in that it is legislation affecting matters with which

the several States of the United States alone have the right to treat by legislation or otherwise.

These questions are now presented for the consideration of this Court in the order above set forth and are urged with equal insistence.

I.

The Act violates the Fifth Amendment to the Constitution in that it deprives the Journal of Commerce and Commercial Bulletin of Liberty and Property without due process of law.

In using the terms "liberty and property" we do so in the broad sense that the words are construed to have been used in the Constitution of the United States, and in a strictly legitimate sense in law, that interference with the profitable and free use of property by its owner arbitrarily deprives him of his property and of some portion of his personal liberty.

Chicago, etc., Ry. v. Minnesota, 134 U. S., 418.

Smyth v. Ames, 169 U. S., 466, 523.

Munn v. Illinois, 94 U. S., 113.

In re Jacobs, 98 N. Y., 98.

People v. Otis, 90 N. Y., 48, 52.

The Act in question requires that certain sworn statements shall be filed by newspapers, magazines and periodicals, twice each year, with the Postmaster General and the postmaster at the office at which such publication is entered, containing, among other matters, the name of the owner of such publication and, if it be owned by a corporation, the names of stockholders owning more than one per centum of the total amount of stock, and the names of known

bondholders, mortgagees or other security holders owning more than one per centum of the total amount of such bonds, mortgages or other securities. Also, in the case of daily newspapers a statement of the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. The Act then provides that not only shall such statements be filed with the government, but that such statements shall be published in the second issue of such publication printed next after the filing of such statement, thus giving this private information to the public. Religious, fraternal, temperance and scientific publications are exempt from filing such statements. The Act then provides that if any specified publication shall fail to comply with these provisions it shall, within ten days' notice by registered letter of such failure, "be denied the privileges of the mail."

At this point there are three questions to be considered: first, the power of Congress to enact a law directing the Post Office Department to put its machinery into operation demanding from citizens of the United States the revealing to the government of their private business and financial affairs, not in aid or assistance in the operation of the Post Office Department, nor for the purpose of the regulation of the mails or the carrying of mail matter, nor for the furtherance of any other governmental power or function; second, the power to compel the publisher, not only to divulge this private information to the government, but to publish it to the world at large, and third, the power of denying the privileges of the mail to publications which do not comply with these requirements.

By Sub-Division 7 of Section VIII. of Article I. of the Constitution of the United States it is provided that Congress shall have power "to establish post-offices and post roads," and by Sub-Division 18 of the same section it is provided that Congress shall have power "to make all laws which shall be

necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." It cannot be denied that in the power thus granted to Congress all incidental powers are granted which are necessary for the regulation of the mail service, such as the limiting of the carriage of mail matter so as to render the service practicable to all the people and, therefore, to exclude matter from the mails to that extent. Neither can it be denied that Congress has the power to enact legislation for the exclusion from the mails of matter which is injurious to the public morals, public health or the public welfare, or which is a menace to the national peace. Necessarily, therefore, the question presents itself is this Act "necessary and proper" in connection with the power to establish, maintain and regulate post offices and post roads. Such a question is properly the subject of judicial inquiry,

McCulloch v. Maryland, 12 Wheat, 316, 420, and any such judicial inquiry must look to whether there is an advantage to be derived to the benefit of the people and whether Congress has adopted a legitimate means of obtaining such object.

The provisions objected to were inserted in legislation appropriating moneys for the maintenance of the postal establishment and have no relevancy thereto. It is clear that they are not intended to regulate the mail service or the carriage of mail matter, for they do not fix rates, classify matter, or exclude obscene or otherwise injurious literature. Neither are they in aid of the police power, for the matter affected is in itself entirely decent and proper, in no way tending to injuriously affect the morals or welfare of the public. They do not possess the justification of an inquiry under the specific power of Congress to regulate commerce among the several States, for the preventing of undue discriminations or favoritism, nor of

an inquiry into the affairs of a corporation under the authority of Congress to lay and collect taxes, duties, imposts and excises, for no revenue is derived to the government. Nor can it be said that such provisions are within the incidental powers impliedly granted to enable the Federal government to properly perform the powers and duties directly imposed upon it for they have no relation to any such duties or functions. In fact, these provisions are not only unnecessary to the powers granted and their administration, but are wholly lacking in any object beneficial to all the people.

The one great purpose of the constitutional power to establish post offices and post roads was to furnish mail facilities to all the people. An *Index Expurgatorius* has been built up from time to time by Congress for the exclusion of all harmful matter or matter impracticable to be handled, but until the enactment of this legislation no attempt has ever been made to exclude matter from the mail unless it comes within these categories. This legislation not being a means to accomplish the legitimate purpose of the maintenance of the postal establishment, or the regulation of the mail service, or the exclusion of harmful matter or matter which it is impracticable to handle, is an attempted exercise by Congress of powers neither expressly or incidentally granted and impliedly condemned by the Constitution.

United States v. Fox, 95 U. S., 670.

United States v. Reese *et al.*, 92 U. S., 214.

Dent v. West Virginia, 129 U. S., 114.

Cummings v. Missouri, 4 Wall., 277.

Ex parte Garland, 4 Wall., 333.

There being no justification by express or implied power to Congress for the legislation in question, with no public service to be subserved, it is an unwarranted, arbitrary and unreasonable interference with lawful private rights, invading personal freedom and confiscating and destroying private property. As was said in

Mugler v. Kansas, 123 U. S., 623, 661,

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The provisions of the Act complained of are a palpable invasion of rights secured by the fundamental law, for Congress has attempted to compel the disclosure of private affairs to the government and their publication to the public without express or incidental power and without even the justification therefor of benefit to the people. This inquisition and publication is in derogation of the inherent rights of the citizen to freedom of liberty and property in the exercise of a lawful occupation.

The word "liberty" as employed in the Constitution of the United States, is not mere freedom from arrest and restraint, but embraces the broader conception of freedom of action, freedom in the selection of a business calling or avocation, freedom of the citizen in the use and control of his property, so long as he does not violate the rights of others, freedom in exercising the rights, privileges and immunities that belong to the citizen generally, and freedom in the conduct and pursuit of a lawful business.

Allgeyer v. Louisiana, 165 U. S., 578.

Booth v. Illinois, 184 U. S., 425.

Ex parte Virginia, 100 U. S., 339, 344.

Munn v. Illinois, 94 U. S., 113, 142.

Lansburgh v. District of Columbia, 11 App. D. C., 512, 521.

In *Butchers Union Company v. Crescent City Company*, 111 U. S., 746, 762, Mr. Justice BRADLEY in his concurring opinion in that case said :

“The right to follow any of the common occupations of life is an inalienable right ; it was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence, which commenced with the fundamental proposition that ‘all men are created equal, that they are endowed by their Creator with certain inalienable rights ; that among these are life, liberty and the pursuit of happiness.’ This right is a large ingredient in the civil liberty of the citizen.”

Also on page 764, the learned justice said :

“I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.”

and on page 765 :

“But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty ; for it takes away from him the freedom of adopting and following the pursuit which he prefers ; which, as already intimated, is a material part of the liberty of the citizen.”

The provisions of this Act complained of do not provide for any legal procedure in which books and papers are to be produced as the basis for the commencement of an action or a judicial inquiry, but they simply provide for the filing of certain statements with the Post Office Department and their publication to the world at large and in the event of non-compliance the arbitrary deprivation of the most important

medium for the conduct of the business of publishing a newspaper.

A copy of the sworn statement must be published for the public to read, not for their advantage or protection, but to the disadvantage of the owner of the newspaper who is subjected to jeopardy unknown to the common law or to modern procedure. The word "liberty" embraces the right to keep secret one's books and papers, his business methods and his knowledge of his own affairs. The right of society only extends to the point of sacrifice in the liberty of its individual members when such sacrifice is the result of due process of law. There must be, and is, reasonable protection against the danger of abuse and no general inquiry into private affairs should be permitted. Vested rights must not thus arbitrarily be interfered with.

In re Davies, Attorney General of the State of New York, 168 N. Y., 89, 105.

As was said by Mr. Justice HARLAN in *Interstate Commerce Commission v. Brimson*, 154 U. S., 447, 478 :

" We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S., 168, 190. We said in *Boyd v. United States*, 116 U. S., 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice FIELD *In re Pacific Railway Commission*, 32 Fed. Rep., 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his

peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' " (Italics ours).

In this Act there is injury inflicted upon the individual without any corresponding benefit to society. It requires the individual to submit to inquisition regarding his private affairs without any customary legal procedure, and its effects are far-reaching and portentous. If the corporation is doing business upon borrowed money for which it has issued its notes or other obligations it must publish to the world the holders of such obligations, to the annoyance of such lenders and the endangering of its credit. It must show the vulnerable spots in its financial armour to the benefit of its competitors and enemies. Banks and other large financial institutions will refuse to loan it money for fear that they will be held out and advertised as supporting or controlling its editorial or political policy. Nor are these fanciful objections. To the business man they are real and alarming.

If the class of citizens here concerned can be subjected to such an invasion no citizen is safe in the right of privacy, the right to keep from the general public his business methods and secrets, the right to the custody of books, papers and correspondence and the general right to shut out the world from private affairs, and Congress can likewise require citizens in all other callings to furnish like information under similar penalties for refusal.

Denial of the privileges of the mail in the manner prescribed by the Act is "without due process of law." This historic formula has descended to us from the time of the Magna Carta of King John, 1215, whose 39th Chapter provides that "no freeman shall be arrested, or detained in prison, or disseized, or outlawed, or banished, or in any way molested ;

and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." This was re-formed in Chapter 29, 9 Henry III., so as to read "Nullus liber homo capiatur vel imprisonetur aut disseisietur *de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis*, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terrae." So that the final form of the clause reads "No free-man shall be * * * disseized of his freehold, or liberties, or free customs * * * unless by the lawful judgment of his peers and by the law of the land." Then came the Confirmatio Cartarum, in 1297, taking the Magna Carta out of the class of mere statutes and placing it in a position of almost holy reverence to which the thoughts of succeeding generations have been directed regarding it as the institution guaranteeing the greatest of all rights, those of life, liberty and property. Through the Renaissance, the Reformation and the Revolutions of 1640 and 1688 grew the broader conception of this institute of civil liberty. Magna Carta, the ancient Constitution of England, merged into the modern Constitution and at the time of the severance of the British Colonies in America from the mother country the doctrines of Coke in his Institutes and the more modern Blackstone in his Commentaries, in which he treats largely of the guarantees of civil liberty, permeated the thoughts of American statesmen and produced an influence on their minds which caused them to evolve in the Constitutions of the several States and in the Federal Constitution the great fundamental principle that no person shall be deprived of life, liberty or property without due process of law. The Commentaries of Blackstone were taught at William and Mary College, before the Revolution of 1776, which numbered among its students, Marshall, Jefferson, Monroe and others who became eminent jurists and statesmen and the influence of this training produced an effect which re-

sulted in the transplanting of certain principles of government from the English Constitution of that time as defined by Blackstone into our Federal Constitution. As Mr. Justice CURTIS said in *Murray v. Hoboken Land & Improvement Company*, 18 How., 272, 276 :

“ The words, ‘ due process of law,’ were undoubtedly intended to convey the same meaning as the words ‘ by the law of the land ’ in *Magna Charta*. Lord COKE, in his commentary on those words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words, ‘ but by the judgment of his peers or the law of the land.’ ”

Likewise, after the adoption of the Fourteenth Amendment, in which appears a similar provision, this Court, in the opinion of Mr. Justice MILLER, in *Davidson v. New Orleans*, 96 U. S., 97, 101, said :

“ The prohibition against depriving the citizen or subject of his life, liberty or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

“ The equivalent of the phrase, ‘ due process of law,’ according to Lord COKE, is found in the words, ‘ law of the land,’ in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown.”

The definitions of the phrase “ due process of law ” are so varied that it is difficult to give an accurate general definition. It is sufficient to say that nothing can be the law of the land

in the sense of the Constitution, however general it may be and however it may affect the rights of all persons alike, which by legislative enactment seizes, forfeits or destroys the property of a citizen or interferes with its proper use without express or incidental authority to Congress under the Constitution.

Due process of law is not confined to judicial process and cannot be thus restricted. It extends to every case which may deprive a citizen of life, liberty or property, whether the process be judicial, or administrative, or executive in its nature.

Stuart v. Palmer, 74 N. Y., 183, 190.

As was said by Mr. Justice MILLER in *McMillen v. Anderson*, 95 U. S., 37, 41 :

“The nation from whom we inherited the phrase ‘due process of law’ has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.”

A legislative enactment must be in accord with the express or incidental powers granted to Congress by the Constitution, and if it deprives a citizen of life, liberty or property, unless by virtue of such express or incidental powers, it is not due process of law. Here, as we have already pointed out, the provisions of the Act complained of do not come within any power of Congress either express or implied and they are, therefore, in contravention of the Fifth Amendment. The Act does not provide any revenue to the government, it is not for the purpose of regulating commerce, it does not regulate the mail service, and it is not “necessary and proper” to the post-office establishment.

Neither does the Act come within the police power, though Congress may have thought so. Police regulations, which

would otherwise be within the prohibitions of the Constitution, can be only such as are clearly necessary to protect the public morals, the public health and the public safety.

If, then, it is absolutely necessary to the public morals, the public health, or the public safety that a newspaper shall file a statement of its private affairs with the government and thereafter publish such statement to the world at large, the provisions of the Act in question might be termed a valid exercise of the police power, but unless such absolute necessity exists the police power cannot be invoked to compel the filing and publication.

In *Colon v. Lisk*, 153 N. Y., 188, 196, the Court, referring to the police power, said :

“Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited. ‘To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts.’ ”

When the police power is exercised in the direction of so regulating the use of private property or so restraining personal action as to secure or tend to the welfare of the people, no constitutional guarantee is violated and the legislative authority is not transcended; but the legislation must be directly to these ends, for, in the mere guise of police regulations, private property or liberty cannot be invaded.

The police power cannot encroach upon vested constitutional rights and the Courts should not be concerned with the probable purpose for which it is attempted to be exercised or uncertain evils which it attempts to correct. The first requirement to the just exercise of the police power is that it must be reasonable, must be moderate and have proportion in its means to the end to be attained.

In *Plessy v. Ferguson*, 163 U. S., 537, 550, this Court, answering a suggestion as to how this power might be carried out, said :

“ The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”

In *Mugler v. Kansas*, 123 U. S., 623, 661, this Court in considering and holding valid a statute of the State of Kansas prohibiting the manufacture and sale within the State of spirituous liquors, in discussing the police power, said :

“ It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

“ It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S., 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. ‘To what purpose,’ it was said in *Marbury v. Madison*,

1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Fisher v. Woods*, 187 N. Y., 90, 94, the New York Court of Appeals declared unconstitutional a section of the penal code, which made a misdemeanor the offering of real property for sale in cities of the first and second class without written authority, the Court there saying (pp. 94, 95) :

"The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety or the lives, health and morals of our inhabitants or the welfare of the community. But the legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution nor prevent him from adopting

and following any lawful profession, trade or industrial pursuit not injurious to the community that he may see fit; nor prevent him from making contracts with reference thereto. To justify the state in interposing its authority in behalf of the public, it must appear that the interest of the public generally, as distinguished from those of a particular class, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation (*Health Department v. Rector, etc.*, 145 N. Y., 32; *People v. Gillson*, 109 N. Y., 389; *Colon v. Lisk*, 153 N. Y., 188; *Lawton v. Steele*, 152 U. S., 133; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y., 116; *Stuart v. Palmer*, 74 N. Y., 183; *Gilman v. Tucker*, 128 N. Y., 190, 200, and authorities in each case cited)."

In *Wright v. Hart*, 182 N. Y., 330, 344, it was said :

"It cannot be reiterated too often that the police power must be exercised within its proper sphere, and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom or confiscates or destroys private property, it is repugnant to the Constitution and should not be permitted to stand, no matter how laudable its purpose or beneficial its effect."

Freund, in his treatise on police power, says (p. 61) :

“The question of unreasonableness usually resolves itself into this : is a regulation carried to a point where it becomes prohibition, destruction or confiscation.”

Absolutely no authority can be found that the provisions complained of in this Act were enacted for the public benefit. Neither the government nor the public at large can be benefited by the knowledge of the private business affairs and financial condition of the owner of a newspaper. On the other hand, the provisions objected to in the Act are more than unreasonable in their demands upon the owner of a newspaper—they are perniciously inquisitorial. They strike down private rights, invade personal freedom and destroy private property in that they ruin the publication if it refuses to meet their arbitrary demands, for ruin would surely follow the denial of the privileges of the mail.

II.

The Act discriminates against appellant and other publishers similarly situated and denies to it and them the equal protection of the laws.

Under our Federal Constitution all persons are equal with equal rights ; and industries and different kinds of business are entitled to equal protection unless there be something connected with them which is obnoxious to the health, morals or safety of the nation.

It is not of any importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot assume a power from an

omission, to enact laws which are unjust and unequal, oppressive and arbitrary, and the Fourteenth Amendment is but declaratory of the principle which had long been recognized at the time it provided the phrase "equal protection of the laws." The very spirit of the Constitution is equal protection of the laws, and for the principles established we may look to the reasoning contained in the numerous cases which have arisen and which have been decided since the adoption of the Fourteenth Amendment.

Chicago, etc., *R. R. Co. v. Chicago*, 166 U. S., 226.
Cotting v. Kansas City Stock Yards, 183 U. S., 79.
Connolly v. Union Sewer Pipe Co., 184 U. S., 540.
Gulf Colorado, etc., R. R. Co. v. Ellis, 165 U. S., 150.
Barbier v. Connolly, 113 U. S., 27.
Duncan v. Missouri, 152 U. S., 377.
Magoun v. Illinois Trust Co., 170 U. S., 283.
Ballard v. Hunter, 204 U. S., 241.
Missouri v. Lewis, 101 U. S., 22.

Equal protection of the laws means equal exemption with others of the same class from all burdens of every kind, for it has been said :

" Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws ' are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." *Cooley's Constitutional Limitations*, 5th Ed., 484, 486.

In *Gulf, Colorado & Santa Fe Railroad Co. v. Ellis*, 165 U. S., 150, 159, in which was presented solely the question of classification, this Court said, referring to many cases, both state and national :

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S., 358, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases references must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Turning then to the Act under discussion, we find in its provisions an astonishing disregard for the principles just set forth. It provides (a) that the owner of a newspaper or other publication shall file with the Government and publish to the world at large twice each year, a sworn statement showing,

among other things, the names of its known bondholders, mortgagees and other security holders and if a corporation, the names and addresses of its stockholders; (b) that the daily newspapers shall include in the statement filed and published, the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. This filing and publishing must be done by appellant and others under penalty for non-compliance of denial of the privileges of the mail. It is here we find the arbitrary discrimination and the imposition of unequal burdens that classifies the Act as class legislation obnoxious to all principles of free government.

Appellant is engaged in a lawful private business. It manufactures and publishes a newspaper which it sells to the public at a stipulated price. It renders services to its advertisers by publishing their advertisements in its newspaper for a compensation which they are willing to pay. The general public has no interest in this business. Its product is not a necessity. It cannot be compelled to publish or sell its newspapers or other publication if it should decide that it did not care to do so. It holds no franchises from the State or Federal Government, is performing no public or quasi-public service and it owes no duty to the public to continue its business or to conduct such business in any particular manner. Its business in no way differs from any other industry whether it be the manufacture of shoes or automobiles or the publication and sale of books. Its business is in all respects private unto itself and cannot be made the subject of governmental interference unless what it is doing in some way offends against the public morals or welfare.

Nevertheless, Congress has assumed to interfere and direct that those engaged in this occupation shall furnish the government with certain information relating to their private affairs and shall publish such information in their newspaper on certain designated dates that all the world may be in-

formed upon such matters. No like requirement under like penalty is imposed upon any other business or calling but publishers of newspapers and periodicals are singled out and required to disclose information as to their private affairs such as is not required from persons in any other calling and are subjected to penalties for failure to comply, which are so arbitrary and severe that they threaten ruin to any one who neglects to obey. This arbitrary and unprecedented action of Congress in placing such oppressive burdens upon appellant and other like corporations and exempting all other occupations and industries, is contrary to the spirit of the Constitution for it denies the equal protection of the laws.

Again, the Act requires that *daily newspapers* shall publish statements of their circulation besides furnishing the same to the Postmaster-General. This information must be given irrespective of whether the circulation is large or small. No other form of publication such as a tri-weekly newspaper, a weekly newspaper or magazine, or a bi-monthly or monthly magazine is required to furnish a statement of its circulation. Daily newspapers are thus singled out and required to disclose business information which heretofore has always been considered private and, in case of non-compliance, are subjected to the penalty of denial of the privileges of the mail. What possible basis there could be for a classification of daily newspapers requiring statements of circulation from them and not requiring similar statements from other newspapers and magazines does not appear. It cannot be that the extent of the circulation has anything to do with the classification for it is a matter of common knowledge that many weekly publications, such as the Saturday Evening Post and the Ladies Home Journal, have a circulation far in excess of the great majority of the daily newspapers published throughout the entire country.

We have been unable to discern that these provisions of the Act are designed to effect any proper governmental purpose

or that the classification pointed out bears any reasonable relation to any proper object sought to be attained. Congress apparently seemed to believe that the public should have the information as to the circulation of daily newspapers. That in itself affords no justification for the Act, otherwise Congress could on a like belief, enact laws requiring manufacturers in all lines of industry, to publish to the world a statement of the goods manufactured and sold by them ; could require them to publish statements of the names of their customers ; could require lawyers, doctors and other professional men to publish and disclose the names of their clients. Such information is no more private to the manufacturer, the lawyer and the doctor than is the matter of circulation to the average daily newspaper. Of course, many daily newspapers trade upon their circulation, but, on the other hand, many papers do not trade upon their circulation and cannot afford to do so, and at all times are careful to guard their circulation figures from their competitors. Papers like appellant occupy a special field but do not have and cannot be expected to have the large circulation that exists for some of the current dailies. On the other hand, appellant's business is built up upon the character of the news, the particular class of business information in the special fields which it alone covers and on the character of its paper and on these things alone depends its business integrity and its value as an advertising medium. In such a situation it would be manifestly unfair to compel appellant to disclose its circulation and hold it open to attacks from competitors whose chief stock in trade is a large circulation.

It is clear, therefore, that the Statute not only bears unequally upon different occupations, but that it discriminates between persons engaged in the same or similar business. In neither case is any reasonable basis pointed out as supporting the classification nor is such classification shown to have any reasonable relation to any end or purpose which it purports to attain. It is therefore unreasonable, arbitrary and bad.

III.

The act violates the First Amendment to the Constitution in that it abridges the freedom of the press.

The provisions objected to abridge the freedom of the press, first, by compelling the filing and publication of certain required statements by newspapers, magazines and periodicals under penalty for non-compliance of a denial of the privileges of the mail, and second, by dictating to newspapers, magazines and periodicals what they shall or shall not publish and the form in which certain matters shall be published under penalty of arrest and fine.

This Act, if valid, would establish a federal control over the press of the country never before attempted, contrary to the spirit of our free institutions and in violation of an express commandment of the Constitution.

The Continental Congress, in 1774, in one of their public addresses (Journals, Vol. I., p. 57), set forth five invaluable rights, without which the people can not be free and happy. One of these rights was the freedom of the press and the importance of this right consisted, as they observed,

“besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.”

Whether the Act of the recent session of Congress under consideration was intended to show the possible influence upon opinion expressed in certain publications by the

holders of their indebtedness, or whether Congress felt resentment at strictures which may have been made, though probably not always without justification, upon certain of its members, and attempted to retaliate by means of this law can only be the subject of surmise. But certain it is that they placed themselves in opposition to the doctrines enunciated by the forefathers upon which our free government was founded and in positive violation of the fundamental law.

The first ten amendments to the Constitution were intended as limitations upon the federal powers previously granted and this Court has always held them so to be.

Barron v. Baltimore, 7 Pet., 243.

Fox v. Ohio, 5 How., 410.

Mechanics & Traders Bank v. Thomas, 18 How., 384.

Twitchell v. Pennsylvania, 7 Wall., 321.

Presser v. Illinois, 116 U. S., 252.

In these cases it has been held by this Court that the prohibitions in these ten amendments were intended as limitations upon the federal government in favor of all citizens. The power vested in Congress to establish post offices and post roads and to make all laws which shall be "necessary and proper" for carrying into execution such power, became subject to the later specific amendatory provision that Congress shall make no laws abridging the freedom of the press. If this were not true this clause of the amendment would be valueless for the reason that only through its power over the postal system can Congress exercise control over the press. When, therefore, we read the Constitution by a comparison of Article I., Section VIII. with the clause of the First Amendment under discussion, we find that Congress shall have power to establish post offices and post roads and to make all laws necessary and proper for carrying into execution ~~such~~ power *provided* that in the exercise of such power

Congress shall make no law abridging the freedom of the press.

In this discussion it is of importance to keep in mind that the constitutional safeguard, which is contained in the First Amendment, and which is invoked by appellant, is not so much a limitation of the express powers of Congress as it is a restraint upon legislation as a means of exercising those powers. It is, to be exact, a restriction upon the incidental powers of Congress.

For a true understanding of the meaning of the phrase "freedom of the press" we must look to what it imported in England and in America at and just prior to the time of the adoption of the First Amendment, for it was the liberty of the press as it was then understood which is safeguarded. In this view, freedom of the press meant the right of free discussion by the press and the right of publishing and circulating a newspaper by any of the usual means or channels, without restraint, except the restraint which then existed under the law of libel.

Blackstone (4 Bl. Comm., side page 152), said that the liberty of the press consisted

"in laying no previous restraint upon publication, and not in freedom from censure for a criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

Freedom of the press as thus understood was the result of continuous struggle between the governing class, who sought to preserve their supremacy, and those who were governed and who sought to improve their condition, which culminated in England and America at about the time of the American Revolution.

At common law the freedom of the press was not well pro-

tected, and it was not until after many struggles that it was so far recognized in England as to permit the publication of current news without the permission of government censors (May, Constitutional History, C. 7, 9, 10). In our earlier colonial period we followed the practices of the mother country. The doctrine of the freedom of the press is still imperfectly acknowledged by some of the great nations under monarchical form of government and is only partially recognized in the fundamental laws of most of them. It is, however, the essential principle in a free government, a government by the people, and transcends every other in importance. We fought for the principle of freedom and by our adherence to this principle we have progressed in civilization and in the betterment of the condition of our citizens.

Freedom of the press as a principle made its first advance when censorship was abolished, which enabled a newspaper and individuals to print and publish their opinions without *previous restraint*. This, however, was only half of the battle for the freedom of the press. The next great step to be taken was to establish freedom from *subsequent punishment*, except for the publication of libelous matter. In the destruction of the censorship despotism received a fatal blow. Government and religion had held the arbitrary power of controlling the expression of public opinion, and the authority thus exerted in the form of the censorship, or previous restraint, prevented the printing of all matter which had not been passed and approved by the censor and provided for the search, seizure and destruction of unlicensed works and the press and equipment used in their production. The Crown originally arrogated to itself this power of control by forbidding everything from being printed except that which had been approved by its censor, and, as a corollary, this resulted in the granting of exclusive privilege to print to its favored minions.

In 1695 a committee of the House of Commons was ap-

pointed to make a report as to what acts, about to expire, should be renewed. It reported in favor of the renewal of the act creating a censorship for the press. The House rejected this part of the report and, thus modified, it went to the House of Lords, which returned it to the House of Commons with an amendment to renew the censorship. The House of Commons refused to concur and in conference the House of Lords withdrew from their position. As Macauley said (*Macauley's Works*, Vol. IV., p. 124), this action of the British Parliament "accomplished more for liberty and civilization than the Great Charter, or the Bill of Rights."

The doctrine of previous restraint having fallen there still remained the question of subsequent punishment. This brought under consideration what could be punished after publication. The only offense upon which subsequent punishment could be inflicted, as the common law then stood, was libel.

At about the period of the making of the Federal Constitution there were two views in England concerning libel in connection with the freedom of the press, that of Lord MANSFIELD in the case of *The King v. Woodfall*, 5 Burr., 2661, and that of Lord KENYON in *Rex v. Cuthill*, 27 St. Tr., 675. Lord MANSFIELD held that a man may print what he pleases without a license, but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the right to defend his innocence before a jury. Later, Lord CAMPBELL declared Lord MANSFIELD's doctrine to have been "based upon a transparent fallacy." Lord KENYON's view was that,

"After all, the truth of the matter, as to the liberty of the press, is very simple when stripped of the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this: That a man may publish anything which twelve of his countrymen think is not blamable,

but he ought to be punished if he publishes what is blamable. This, in plain common sense, is the substance of all that has been said upon the subject."

Lord KENYON'S view was the conception then in the public mind which became crystallized in the bill of Mr. Fox passed unanimously in the House of Commons, and by a liberal majority in the House of Lords, in 1793, enacting that in public prosecutions while judges might express their opinions as to whether a given paper was a libel, yet the jury should have the right to pass upon the question in rendering their verdict. This took the entire power from a permanent magistracy and placed it in the hands of a jury selected by the people.

American statesmen of that time ardently believing in the principles of free government, detesting the doctrines of despotism and the exercise of arbitrary power by government, having before them the example of conflict over this question in England, sought to safeguard the freedom of the press not only from censorship and previous restraint, but from invasion by the legislative branch of the government.

Alexander Hamilton, than whom no abler exponent of the ideas of his times can be found, in the celebrated case of *People v. Crosswell*, 3 Johnson's N. Y. Cases, 337, 360, which was a prosecution for scandalous, malicious and seditious libel upon Thomas Jefferson, the President of the United States, sets forth, in the recapitulation of his brief, the principles as then understood in this country. He said :

" 1. The liberty of the press consists in the right to publish with impunity truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals.

" 2. That the allowance of this right is essential to the preservation of free government ; the disallowance of it fatal.

" 3. That its abuse is to be guarded against, by sub-

jecting the exercise of it to the animadversion and control of the tribunals of justice ; but that this control cannot safely be intrusted to a permanent body of magistracy, and requires, the effectual co-operation of court and jury.

“ 4. That to confine the jury to the mere question of publication, and the application of terms, without the right of inquiry into the intent or tendency, reserving to the court the exclusive right of pronouncing upon the construction, tendency, and intent of the alleged libel, is calculated to render nugatory the function of the jury ; enabling the court to make a libel of any writing whatsoever, the most innocent or commendable.

“ 5. That it is the general rule of criminal law, that the intent constitutes the crime ; and that it is equally a general rule, that the intent, mind, or *quo animo*, is an inference of fact to be drawn by the jury.”

Judge KENT, afterwards Chancellor, before whom this case came, gave his full approval to this statement of principles.

Freedom of the press as used in the First Amendment means that degree of liberty which permits, without previous restraint, the publication of any writing, without restriction as to any subsequent penalty, save that which may be found, on a regular trial by jury, to be such a publication as the law at that time condemned as libelous.

But it was not from the judicial or the executive branches of the government that the people feared an attack upon the freedom of the press. Their fear was that the legislative branch might by enactment violate this principle and it was for this reason that the Constitution was amended so as to prohibit Congress in express terms from enacting any law abridging the freedom of the press. By this wise amendment the people of the United States fixed a principle of freedom to endure for all time and any attempt to infringe upon it, no matter in what degree, must necessarily meet with instant and peremptory challenge.

The provisions of the Act in question practically re-establish the censorship in that they provide a *previous restraint* by demanding that unless the class of newspapers, magazines and periodicals indicated *first* file certain required statements as to their private affairs they shall be denied the privileges of the mail, the chief medium of their circulation, to all intents and purposes suppressing them through a government functionary, who is charged with the duty of excluding them; and the provisions of the Act also provide for a *subsequent punishment* by providing a severe penalty for not marking certain editorial or reading matter with the word "advertisement," although such comment or matter is neither libelous, nor contrary to the public morals, the public health, or the public welfare, thus, by these two provisions, distinctly abridging the freedom of the press as prohibited by the First Amendment.

There can be no doubt but that Congress in the exercise of the police power has the right to exclude by appropriate legislation all articles or matter from the mails which is contrary to public morals and such exclusion is not an abridgement of the freedom of the press.

Ex parte Jackson, 96 U. S., 727.

In re Rapier, 143 U. S., 110.

But let us clearly understand to what extent the exercise of the police power by Congress in relation to the mails has been held to be authorized. In *Ex parte Jackson*, at p. 736, Mr. Justice FIELD, in delivering the opinion of this Court, said :

" In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared ' that

no obscene, lewd or lascivious book, pamphlet, picture, paper, print or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which, indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than \$100, nor more than \$5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.'

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people."

In the course of the opinion, Mr. Justice FIELD, on page 732, said, concerning the power of Congress to regulate the postal system :

"The difficulty attending the subject arises not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with the rights reserved to the people, of far greater importance than the transportation of the mail." (Italics ours.)

And again on page 733 :

" Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing ; indeed, without the circulation the publication would be of little value." (Italics ours.)

This decision met with the approval of this Court in the *Rapier* case.

It is therefore clear that Congress can exercise the police power so as to prevent the use of the mail for any immoral or demoralizing purpose, but it is equally clear that unless a newspaper, magazine or periodical comes within this category by the printing of matter condemned as harmful to the people, Congress must not deny it the use of the mail. Neither can Congress dictate and control what shall or shall not be published in a newspaper, magazine or periodical under a penalty for non-compliance of arrest and a fine upon conviction. The rights reserved to the people are of far greater importance than the transportation of the mail and Congress must not attempt through its power to regulate the mail to interfere in any manner with the freedom of the press.

But freedom of the press at the time of the adoption of the First Amendment imported the right of free discussion in print, without any restraint, except that which was imposed by the law of libel as it then existed in the jurisprudence of England and America. The exclusion from the mail of anything injurious to the public health, the public morals or the public welfare at the present time is not a restraint upon the freedom of the press, but can Congress go to the point of making a law which interferes with the liberty of printing and the liberty of circulating, and thus prevent free discussion ? If this power exists what is to prevent Congress from further extending its power by the denial

of the privileges of the mail or the imposition of a severe penalty with respect to any newspapers owned or financially influenced by individuals advocating certain public questions or the policies of political parties? Certainly no one would attempt to uphold the right of Congress to so legislate and yet this legislation is just as drastic and just as far reaching as that suggested.

Here Congress not only imposes penalties for failure to furnish the government with information as to the affairs of the press, but it commands the press on certain designated dates to publish certain matter and at all other times to label other matters "advertisement," thus dictating certain things to be published and when and how they shall be published. This, if upheld, re-establishes a censorship and control over the press that is directly contrary to the Constitution.

In 1835 President Jackson, in his annual message, discussed the attempted circulation of inflammatory appeals to slaves in newspapers and other publications, tending to stimulate them to an insurrection, and suggested to Congress the advisability of enacting a law for the suppression of such "incendiary publications." The matter was discussed at length in the Senate upon the theory of the power of Congress to exclude such publications from the mail. The question was referred to a committee, of which Mr. Calhoun was chairman. He presented an elaborate report, in which he contended that the power was in the States, and not in Congress, to determine what is and what is not calculated to disturb their security. While condemning in the strongest terms the circulation of such publications, he insisted that Congress had no power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the freedom of the press. The prevailing opinion of the Senate was in favor of his report and against the existence of such a power in Congress.

It seems from this that in the earlier days of our Nation when Congress was in closer intellectual contact with the

theories and doctrines of those who framed the Constitution and its amendments, they did not approve of a restraint upon free discussion in the press even though it went to the extent of "incendiary publications," as it might abridge the freedom of the press. Times have changed and so have the ideas of legislatures, but this principle of the First Amendment is immutable.

The real underlying purpose of this legislation can only be the subject of guess-work and this can only lead to the supposition that Congress wished to compel a certain class of publications to disclose the names of the holders of their stocks, bonds, mortgages and other securities or to show that they received a valuable compensation from some person for the printing of some of their reading matter, on the possibility that the influence of such persons might be such as to cause the expression of a biased opinion by the publications in question. This is a very far drawn supposition and however desirable it may be for the readers of a publication to know whether it speaks impartially or not, it is not within the power of Congress to control the press of the country in this respect and to attempt to do so is an interference with free discussion, for even the holder of a corporate obligation is entitled to be heard in the policy of the corporation in which he is interested. Every newspaper, magazine or periodical has the right to express its opinion no matter who owns it or influences it and to deny it this right, either directly, or indirectly, by the use of a governmental department or by subjecting it to a heavy penalty, is in contravention of the Constitution.

Some justification for the Act might be said to exist if the purpose of the filing was to require information to be given to the Postmaster to afford a basis for fixing rates, or classifying matter, but such is not here the case. Matter is now classified and rated according to existing laws and

regulations which this Act in nowise affects and the neglect of the publisher to file the information does not merely deprive him of his right to send his publication as second class matter and of the benefits of the second class rate, it deprives him absolutely of the privileges of the mail for his publication. Certainly this is not necessary, nor appropriately designed, for the purpose of aiding the regulation of the mails, the carrying of mail matter or the fixing of rates. Any other purpose attributed to the Act is, as previously pointed out, a matter of speculation, and yet such an Act should not properly be a subject of speculation. All that can be done is to read it as it stands and apply the principles involved to determine whether it violates the Constitution. When this is done we think it clearly appears that the Act establishes a governmental control over newspaper publishers and dictates to them what shall or shall not be published and the manner, form and time of publishing. In other words, Congress in plain language provides that matter inherently proper and mailable shall be unmailable not on account of any inherent defect, but solely because the publisher may refuse or neglect to advise the public of certain of his private matters as to which Congress seems to desire the public to be informed. This is not regulation, but paternalism and a direct and positive abridgement of the freedom of the press.

IV.

The Act is illegal and void and beyond the power of Congress to enact, being an usurpation by Congress of powers expressly reserved to the States of the United States, in that it is legislation affecting matters with which the several States alone have the right to treat by legislation or otherwise.

The provision of the law which seeks to compel the publisher of a newspaper, magazine or periodical to mark any editorial or reading matter for which compensation is paid, accepted or promised, with the word "advertisement," under penalty for non-compliance of arrest and fine, is a clear usurpation by Congress of powers expressly reserved to the States. In clear and unequivocal language the Act provides that certain acts, when and wherever committed, whether within the confines of a State or in Federal territory, whether within or without the jurisdiction of the Federal government, shall be a crime punishable by fine. Congress is without power to enact any such legislation, for power in such matters is expressly reserved to the States.

In discussing the powers reserved to the States it is well to consider the circumstances attending the adoption of the first ten amendments, in order to give a true understanding of the powers reserved as conceived at the time of the adoption of the amendments. On June 8th, 1789, James Madison introduced in the House of Representatives a series of propositions, covering matters which had been promised by the supporters of the Constitution, as an inducement to its adoption, offering certain desired guarantees. He deemed it his duty to call upon Congress to remove by a wise exercise of the

power of amendment the honest doubts and fears of the people as to the security of their rights under the new federal system.

"It appears to me," he said, "that this House is bound, by every motive of prudence, not to let their first session pass over, without proposing to the state legislatures something to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States as it has been found to be to a majority of them. It will be desirable to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and freely bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be engrafted so as to give satisfaction to the doubting part of our fellow citizens, the friends of the Federal Government, by yielding them, will evince that spirit of deference and concession for which they have been hitherto distinguished."

As is said by Rives in "The Life and Times of James Madison," vol. 2, pages 38-46 :

"The amendments proposed by Mr. Madison were, therefore, mainly in the nature of a Declaration of Rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the ægis of the Constitution, and by an express interdiction beyond the reach of the Government."

The amendments in conformity with the proposals of Mr. Madison were submitted to the legislatures of the several

States by action of the First Congress on September 25th, 1789, prefacing them with the preamble :

“ The conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution * * *.”

By this declaration it was clearly stated that the intention of the amendments was to prevent misconstruction or abuse of powers by declaratory and restrictive clauses of limitation.

There are numerous authorities, unnecessary to quote, to the effect that the first ten amendments are to be regarded as limitations on the powers of the Federal Government and not upon the powers of the States.

As was said by Mr. Chief Justice MARSHALL in delivering the opinion of this Court in *Barron v. Mayor and City Council of Baltimore*, 7 Pet., 243, 247 :

“ The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself ; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself ; not of distinct governments, framed by different persons and for different purposes.”

And again at page 250 :

" But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

" In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states."

What can be more specific than the language of the Tenth Amendment, which provides,

" The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Unless the right of Congress to pass this provision of the Act in question can be clearly shown under the powers delegated to the United States by the Constitution, it comes within the reservation. It certainly does not come within the express power to tax nor to regulate commerce, for it imposes no tax and relates equally to papers that are the subject of intrastate commerce alone; and it cannot come within the power to establish post offices and post roads, for it is not in aid or assistance in the operation of the postal establishment, nor in the regulation of the mails or the carriage of mail matter. It

does not come within the police power to protect the public health, the public morals or the public welfare, for the matter concerned is inherently decent and proper. There is, therefore, no power in Congress express, incidental or implied for the making of such a law, and, moreover, the act it seeks to make an offense, if it be an offense at all, is not an offense against the United States.

In the case of *United States v. Fox*, 95 U. S., 670, the proposition that an act committed within a State cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, is plainly stated. Mr. Justice FIELD in delivering the opinion of this Court, said, on page 672 :

“ Any act committed with a view of evading the legislation of Congress *passed in the execution of any of its powers*, or of fraudulently securing the benefit of such legislation may properly be made an offense against the United States. *But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate.*” (Italics ours.)

This provision of the Act complained of is opposed to the proper dignity and sovereignty of State governments. The Constitution of the United States has been granted limited powers, which are clearly defined, and the legislative branch of the government within the scope of these powers is restrained by a rigid bill of rights for the protection of citizens from oppression. It cannot be gainsaid that the common interest of the people of this country requires that both State and National governments should be allowed without jealous interference on either side to exercise all the powers which respectively belong to them, but both State rights and the

rights of the United States should be equally respected, for both are essential to the preservation of our liberties and the perpetuity of our institutions, and the Federal legislature should not be permitted to overstep the bounds of its powers as granted by the States.

There can be no doubt of the right of States of the Union to control their purely internal affairs and in so doing they exercise powers expressly reserved from the National government. To legislate as to a crime committed within a State is purely a function of a State legislature. If there be an offense in not plainly marking editorial or other reading matter for which compensation is paid with the word "advertisement," it must come within the jurisdiction of the State where the offense is committed and then only by an exercise of the police powers of such State.

Among the powers reserved to the several States is their police power—that inherent and necessary power essential to the very existence of their civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime. As Mr. Justice STORY said in delivering the opinion of this Court, in *Prigg v. Pennsylvania*, 16 Pet., 539, 625, the police power belonging to the States in virtue of their general sovereignty, "extends over all subjects within the territorial limits of the states; and never has been conceded to the United States." This is well illustrated by adjudications that a statute prohibiting the sale of illuminating oils below a certain fire test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States, as for example, the Federal district and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute even as to oils manufactured under letters patent from the United States.

In the case of *United States v. De Witt*, 9 Wall., 41, this question was determined. The 29th Section of the Internal

Revenue Act of March 2nd, 1867, made it a misdemeanor, punishable by a fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer for sale oil made of petroleum for illuminating purposes inflammable at less temperature or fire-test than 110 degrees Fahrenheit.

This provision was interjected into an act imposing internal revenue duties in much the same manner as the provision complained of has been interjected into the Act providing appropriation of moneys for the maintenance of the postal establishment.

Mr. Chief Justice CHASE, in delivering the opinion of the Court said, at pages 43, 44 and 45 :

“ The questions certified resolve themselves into this : Has Congress power, under the Constitution, to prohibit trade within the limits of a State ?

“ That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms ; and as a virtual denial of any power to interfere with the internal trade and business of the separate States ; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

“ It has been urged in argument that the provision under which this indictment was framed is within this exception ; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles ; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed ; while, in the case before us,

no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

"This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

"There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this Court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

See, also,

United States v. Press Pub. Co., 219 U. S., 1.

James v. Bowman, 190 U. S., 127.

Baldwin v. Franks, 120 U. S., 678.

Civil Rights Cases, 109 U. S., 3.

United States v. Harris, 106 U. S., 629.

United States v. Reese, 92 U. S., 214.

The police power as we have said comprehends all measures for the protection of the citizen of the State from disorder, disease, poverty and crime. This power being necessary to the maintenance of the authority of local government and to the safety and welfare of the people, is inalienable. As was said by Mr. Chief Justice WAITE, in *Stone v. Mississippi*, 101 U. S., 814, 819,

“No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.”

The provision of the Act complained of although inserted in the postal appropriations act has no relevancy thereto. There is no penalty of denial of the privileges of the mail for not marking the editorial or reading matter referred to with the word “advertisement.” Under this provision a newspaper, magazine or periodical which does not make use of the mails, if such a one could be found, is nevertheless liable. It is also liable even if no copy of its paper containing the prohibited matter be sold or delivered on Federal territory or beyond the territorial limits of the State of its domicile and operation. It is clear that Congress in this provision has overreached itself in an attempt to exercise a control over the press of the country, for the legislation in question is entirely without and beyond the power delegated by the Constitution of the United States.

V.

The provisions of the Act being unconstitutional, the decree of the District Court should be reversed.

Respectfully submitted,

ROBERT C. MORRIS,

GUTHRIE B. PLANTE,

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CONGRESS HAS NOT ABRIDGED THE FREEDOM
OF THE PRESS.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

Nos. 818 AND 819.

THE JOURNAL OF COMMERCE AND COMMERCIAL BUL-
LETIN,

Appellant,

v.

FRANK H. HITCHCOCK, AS POSTMASTER GENERAL OF
THE UNITED STATES; GEORGE W. WICKERSHAM,
AS ATTORNEY GENERAL OF THE UNITED STATES,
ET AL.,

Appellees.

LEWIS PUBLISHING COMPANY,

Appellant,

v.

EDWARD M. MORGAN, AS POSTMASTER OF THE UNITED
STATES OF AMERICA IN AND FOR NEW YORK CITY,
BOROUGH OF MANHATTAN,

Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

These two cases (No. 818, hereinafter called the *Journal of Commerce* case, and No. 819, hereinafter called the *Morning Telegraph* case), while based upon slightly different theories as to the construction of the "newspaper publicity" feature of the Post Office

Appropriation Act, approved August 24, 1912, nevertheless attack its *constitutionality* upon substantially the same grounds. (37 Stat. at L. 539, 553.)

The *Journal of Commerce* seeks (1) to enjoin the Postmaster General and the New York postmaster because it construes the act to mean that it will be excluded from the mails if it fails to comply with the provision about publishing the name of the editors, owners, etc., and (2) to enjoin the Attorney General and the United States district attorney from prosecuting it because, as it construes the act, it will be prosecuted criminally (though not excluded from the mails) if it publishes any editorial or reading matter for which it receives compensation without marking it "advertisement." (Rec. No. 818, p. 8; Cf. XV and XVI.)

The *Morning Telegraph* sues no one but the postmaster of New York, and merely seeks to enjoin him from excluding it from the mails, because, on the other hand, it construes the act to mean that all newspapers, etc., are to be excluded from the mails unless they (1) publish the names of their editors, etc., and also (2) mark as an "advertisement" all matter for which they receive compensation. (Rec. No. 819, p. 6.)

We are thus met at the very threshold of the case with a question, not so much of *interpretation* (for the words are plain and unambiguous), but of *construction*; that is to say, we must determine the relation and effect of the different portions of the section to and upon each other.

It is elementary that every reasonable construction of a statute must be resorted to, even though such construction be not the most natural or obvious one, in order to save a statute from unconstitutionality.

The very essence of construction is the extension of the meaning of a statute beyond its letter; or, as said in *United States v. Farenholt*, 206 U. S. 229: "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."

For example, it may be that Congress has no power to prohibit a newspaper from (or to punish it for) publishing this or that, or requiring it to mark any of its articles "advertisement"; and part of the present statute is, in form, possibly open to the objection just suggested, but when the general legislative intent is considered that objection can be eliminated by a very reasonable construction of the act, to wit, that it only means that no newspaper shall use a certain highly favored low postage rate unless it conforms to such regulations.

THE PROPER CONSTRUCTION OF THE ACT.

The United States contends that the proper construction of the act should be as follows:

I. That no newspaper, magazine, etc., shall use the second-class mail privilege unless it shall

(a) File with the Postmaster General and postmaster, and publish in its second issue

thereafter, the required statement giving the names of its editor, publisher, bondholders, etc., and its circulation; and

(b) Mark as an "advertisement" anything for the publication of which it receives compensation,

within ten days after receiving notice, by registered mail, of its failure to do those things.

II. That any editor or publisher who, after receiving such notice, uses the second-class mail privilege for the transmission of his publication without marking such paid-for articles "advertisement" shall be fined from \$50 to \$500.

III. That the foregoing provisions shall not apply to religious, fraternal, temperance, and scientific or other similar publications.

So construed, the entire section is valid.

If, however, it should be held that the requirement that newspapers should mark paid-for articles "advertisement" was not intended as a mere condition precedent to the use of the mails, but was an independent and direct requirement, and that it was, therefore, unconstitutional either as an abridgment of the Freedom of the Press in violation of the First Amendment or as an invasion of the powers reserved to the States under the Eleventh Amendment, then and in such event the United States further contends—

IV. That the "advertisement" clause so construed is separable from the balance of the section,

and may be declared void without affecting the validity of the prior provision denying the use of the mails unless the statement be filed giving the names of the editor, publisher, etc., which latter provision can still stand alone.

The Post Office Appropriation Act.

Section 2 of the Act of August 24, 1912, 37 Stat 553, 554, reads as follows:

Sec. 2. * * *

That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is *entered*, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of *this paragraph* shall not apply to religious, fraternal,

temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be *denied the privileges of the mail* if it shall fail to comply with the provisions of *this paragraph* within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any *such* newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500).¹

¹ For brevity, we will use the term "newspaper" to include "newspaper, magazine, periodical or other publication"; and we will use the term "editor" to include "editor and managing editor, publisher, business managers and owners."

FIRST POINT.

The statute means that in order to obtain the low, second-class postal rate all newspapers must comply with two requirements, to wit:

A. File with the Post Office Department and publish in the paper the name of the editor, and

B. Mark as an "advertisement" any article for the publication of which the newspaper receives compensation;

and, in default of so complying, shall be denied the second-class postal rate.

The statute is inartificially drawn and might have readily expressed this idea in a more apt form; but the legislative history of the act shows that such was clearly the intent of Congress.

Independently of the intent of Congress, as reflected in such history, the statute can, without undue violence to its language, be so construed.

I.

The intent of Congress as deduced from the legislative history of the act.

1. *As originally passed by the House.* One *typographical* paragraph¹ made it unlawful to send (as second-class mail) any newspapers through the mails unless such newspapers

(1) showed the names of the editor; and

(2) Marked as "advertisement" any article for which any consideration was received or

¹ For convenience, we shall use the term "*typographical*" paragraph to indicate that division of printed matter formed by beginning on a new line and leaving a small blank space before the first letter; the term "*literary*" paragraph will indicate that portion of printed matter relating to the same general subject matter, whether composed of one or more sentences or one or more "*typographical*" paragraphs.

promised; and signed the name of the person in whose interest it was published (hereafter called the "advertisement" clause); and imposed a fine from \$100 to \$1,000 for sending anything through the mails in violation of those provisions, but exempted certain publications in these words:

Provided, That nothing in this paragraph contained shall apply to or include periodical publications published by or under the auspices of fraternal or benevolent societies or orders or trades-unions.

As the "typographical" and "literary" paragraph were one and the same thing, there could be no doubt as to what the words "*in this paragraph*" referred to; and, therefore, as originally passed, fraternal, etc., publications were entirely exempted from the operation of both the "advertisement" clause and the necessity of printing the name of the editor.

2. *Report of the Senate committee.* The Senate committee struck out the House provision; and in its report to the Senate offered a substitute, split into two typographical paragraphs.

The first paragraph (instead of requiring *each issue* to contain the name of the editor) provided for filing a statement of the name of the editor, and for its *semiannual* publication only; and in other respects lessened the requirements, and denied the use of the mails to any publication failing "to comply with any provision of this paragraph." The second para-

graph (omitting the requirement that paid-for articles should be *signed* by the persons in whose interest they were published) merely required paid-for articles to be marked "advertisement," and reduced the penalty to a fine of \$50 to \$100.

It is thus seen that while the House bill provided in apt form that it should be unlawful to deposit in the mails as second-class mail any publication unless it conformed to the requirements therein set out, the Senate substitute changed the form of the bill.

By the first typographical paragraph it required certain things of newspapers, and then provided for their exclusion from the mails if they failed "to comply with any provision of this paragraph," [thereby leaving open for judicial construction whether the words "*this paragraph*" refer to that "typographical" paragraph, or to it and the succeeding one, which, taken together, constitute one *literary paragraph*].

By a second typographical paragraph it required paid-for articles to be marked "advertisement," with a fine affixed for a failure to do so, but with no direct statement as to the exclusion from the mails, unless, by construction, the provision in the preceding paragraph as to "*this paragraph*" should be deemed to refer to both "typographical" paragraphs as constituting one "literary" paragraph.

In altering its form the Senate committee had no intention of doing anything more than to soften some of the rigid requirements of the House bill and to render its administration more practicable, but

without making any change either in the principle to be enforced or in the source from which Congress derived its constitutional power to enact the bill.

The Senate committee reported the following indorsement on the House bill (Information print, p. 63):

"Disagreed to. Committee thoroughly believed in the principle sought to be enforced, but on investigation found it impracticable of administration and therefore offered as an amendment *paragraph* 133, which in committee's opinion accomplishes the end sought under the House provision and furnishes a practical method for such accomplishment, with less expense to the parties affected by the provision."

The Senate committee used the word "paragraph," not in the typographical sense but as relating to the subject matter under discussion, to wit, the "literary" sense, as is shown by its use of the word "paragraph" (singular) in referring to its amendment (No. 133), which was divided into *two* "typographical" paragraphs, but it spoke of it as "paragraph 133."

This is further shown by the report of the Senate committee (No. 955), where it is said (p. 24):

PUBLICITY OF OWNERSHIP AND CONTROL OF
NEWSPAPERS AND MAGAZINES.

The second paragraph of section 2 of the bill as it was passed by the House prohibits the mailing of newspapers, magazines, or other publications unless there be printed

therein the names and addresses of the editors and owners and of the owners of stock, bonds, or other securities to the amount of \$550 or more, daily papers being required to publish this list only once a week. *This paragraph* also requires that editorial or reading matter for which compensation is received shall be plainly marked "advertisement" or signed by the name of the person in whose interest it is published.

With the purpose of *this paragraph* the Senate committee is in hearty accord, as also, we believe, are a vast majority of the newspaper and periodical publishers of the country.

The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

But we believe that the requirements of *the paragraph* as passed by the House are needlessly burdensome, hence we recommend the *substitution* of a *paragraph* requiring that the list of owners, stockholders, or security holders be filed with the local postmaster and

the Postmaster General semiannually and as frequently printed in an issue of the publication.

The committee thus declared its "hearty accord" with all the provisions of the House bill (including the "advertisement" clause), but, thinking they were "needlessly burdensome," recommended the substitution of a paragraph (singular) [which consisted, however, of *two* typographical paragraphs] limiting the publication of the names of the editor, owner, etc., to twice a year. Clearly, the committee, while changing somewhat the form of the bill, did not intend thereby to impair its constitutionality by abandoning the exercise of the only power through which it could accomplish the result sought, but it only intended, as it aptly said, to furnish "a practical method with less expense to the parties affected."

3. *As finally passed by Congress.* After conference, the House and Senate concurred and enacted the measure in the form proposed by the Senate committee with a few further unimportant amendments, the most important being the insertion in the first typographical paragraph of the following clause:

Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications.

By exempting religious, fraternal, scientific, etc., publications from "the provisions of *this paragraph*" it clearly meant not merely the typographical paragraph relating to the semiannual publication of the

names of the editor, but it also intended to exempt those favored publications from the provisions of the succeeding typographical paragraph as to marking paid-for articles "advertisement." In short, here again the term "*this paragraph*" referred to the *literary* paragraph and not to the mere typographical paragraph in which the exempting clause was inserted.¹

The Government, therefore, insists that the legislative history shows that Congress in its final enactment of the bill had the same intent that the House had in originally passing it, namely, merely to exclude from the second-class mail privileges all publications that did not comply with the requirements laid down in the act. The changes in the bill all related to the terms of the requirements, and were not intended to affect the broad principle that Congress (pursuant to its power to decide what should be carried by its mails) was limiting the use of the second-class mail privileges to those newspapers that would comply with certain regulations which Congress felt it wise to impose as conditions upon such use.

¹ As originally passed by the House, the bill provided that "nothing in this paragraph" (thereby including both the clause as to publishing the name of the editor and the "advertisement" clause) should apply to fraternal, benevolent, or trades-union publications. The Senate committee struck out that exemption and made the act apply to *all* publications. The Senate and House restored the exemption clause in somewhat broader language and clearly intended to exempt the specified publications from *all* the provisions of the act. They could not have meant to exempt them only from the necessity of filing the statement, etc., as required by "this [typographical] paragraph," and leave them subject to the "advertisement" feature of the next paragraph. This again indicates that throughout the act Congress used the word "paragraph" in its *literary* and not in its mere "typographical" sense.

II.

The reasonable construction of the language used.

Nothing is better known than that many, very many, statutes are drawn and passed with the most obvious evidences of haste, casual consideration, lack of knowledge of constitutional principles, ignorance of many of the facts to which the statute will apply or of the consequences which will flow from its operation in quarters its makers never knew existed.

If, therefore, the language used in a statute were always given its plain, simple, obvious meaning and so applied to all the facts to which it was applicable, one or more of three results would frequently follow, to wit: Either it would be unconstitutional or it would amount to nothing and accomplish nothing, or it would achieve results so absurd or burdensome as to demonstrate that no such intention could have prompted its passage. And so long as our laws are passed in the hasty and unconsidered way that they are, just so long will one of the most difficult tasks of our courts be to construe them, and thereby to give some effect to them without transgressing constitutional restrictions, and yet accomplish as near as may be that which its authors intended.

It is no easy task. It is never easy to know what another intended save by the language used; and yet if that language implies the exercise of a power not possessed, or leads to results so absurd or unreasonable as to create the belief that no such effect was intended, it becomes the duty of the court not

to adhere to the letter and destroy the spirit, nor, on the other hand, to reject it all as meaningless or violative of constitutional restrictions, but to strive as best it may to give such a meaning as can fairly and reasonably be done without substituting its own will for that of the authors and yet give effect to the instrument.

With these principles in mind let us see what the language of the act may fairly be said to mean.

1. *The act only applies to newspapers using, or desiring to use, the second-class mail privileges.* That the statute did not refer to all publications generally, but only (1) to those *using the mails* and (2) *to their use thereof* is thus shown: (a) the title of the act is "for the service of the *Post Office Department*;" (b) the whole act relates to the *use of the mails* and the operation of the postal service; (c) the particular paragraph requires the statement to be filed with "the postmaster at the office at which said publication is *entered*," which is meaningless except in relation to the use by the newspaper of the mails; (d) one sentence provides that the publication shall be "denied the privileges of the *mail*;" and (e) even the "advertisement" clause refers only to "any *such* newspaper," etc., i. e., newspaper to which the previous paragraph applies. In short, the general subject of the statute is *the use of the mails* by newspapers, etc., and that idea should be borne in mind in construing the language of particular sentences. *Pollard v. Bailey*, 20 Wall. 520, 525; *Blair v. Chicago*, 201 U. S. 400, 463.

Furthermore, the statute only applies to publications in so far as they *use the second-class mail privilege* and does not refer to their use of the mails generally. It provides that the editor shall file a statement giving the names and addresses of editor, publisher, owner, etc.,

“with * * * the postmaster at the office at which said publication is *entered*.”¹

It follows, therefore, that the present statute does not even attempt to regulate the use of the mails generally, but only to the extent that publications have been “entered” at a post office in order to obtain the low second-class postage rate of one cent per

¹ While the statute in its opening language applies to *every* newspaper, etc., the succeeding words qualify this generality and limit the application of the language to such newspapers as are “entered.” As used in reference to the postal system, “entered” is a technical word with a distinct and long-established meaning. It refers to the granting of second-class postage rates to newspapers and periodicals. It has *no reference whatever* to first, third, or fourth class mail matter.

The “Postal Laws and Regulations” provide that when a publication is admitted to the second-class mail privilege it must print on each issue “Entered ——— at the post office at ——— as second-class matter,” etc. (sec. 442); and the word “entered” is never used except in relation to the admission to second-class mail privileges. (See secs. 438, 440, 442, 443, 445, 452, 456, 460, 467.)

In this very statute Congress (1) made an appropriation for 110,000 copies of the “Postal Laws and Regulations,” (2) amended section 233 thereof, and (3) used the term “entered” with reference to admitting a new class of publications to second-class mail privileges (37 Stat. at L., 541, 545, 551); thus distinctly recognizing the force and effect of the “Postal Laws and Regulations” in which the technical meaning of the term “entered” is given and then adopting and using the term in its technical sense.

Again, the report of the Senate committee (p. 10, *supra*) shows that this legislation was expressly based on the idea that papers which received the low second-class postage rate owed a duty to the public which bore the expense to give publicity to their ownership, circulation, etc., which would have no application to publications not seeking the low second-class rates but paying the full compensatory third or fourth class rates.

pound; that Congress has dealt only with those publications which apply for and receive the second-class mail privileges; that it only undertook to deny the use of the mails to such second-class publications as refused to comply with certain regulations it deemed wise to impose; and that even of those it excepted religious, fraternal, temperance, scientific, etc., publications.

Although, in form, the first "typographical" paragraph requires each editor to file the required statement, and denies the use of the mails to any publication that fails to do so, it seems too clear for argument that the statute will be construed to mean simply that publications will be denied the use of the mails *unless* they file the statement, etc.; that is to say, as a condition precedent to the use of the mails the publications must conform to such regulation.

It will not be construed as applying to newspapers that do not use the mails at all, but reach their readers by some other mode of circulation; nor does it apply even to those publications using the mails further than to provide that *unless* they file the statement, etc., they shall be excluded from using the *second-class* privileges established by Congress.

2. The words "*this paragraph*" refer to the whole subject of newspaper regulation. The statute says:

Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of *this paragraph* within ten days after notice by registered letter of such failure.

The critical question in the construction of this statute is, Do the words "this paragraph" refer to the mere *typographical* paragraph in which they occur, or do they refer to the entire literary paragraph (composed of *two* typographical paragraphs), which deals with the subject of newspaper regulations?

The Century Dictionary thus defines a "paragraph":

1. A distinct part of a discourse or writing relating to a particular point, whether consisting of one sentence or of many sentences: in this sense the word does not necessarily imply the division defined below.

2. A division of written or printed matter, usually formed by beginning on a new line, and by leaving a small blank space before the first letter.

The legislative history above reviewed (p. 7-13, *supra*) shows that Congress used the word "paragraph," not in the narrower sense of limiting it to the identical *typographical* paragraph in which it appears, but in the broader sense of that part of section 2 relating to the requirements imposed upon newspapers, etc., as distinct from the earlier part of section 2, forbidding contracts for postal supplies with anyone in a combination to raise prices, etc.

This is further shown by a consideration of the same words "this paragraph" where they appear in the middle of the first typographical paragraph, as follows:

Provided, That the provisions of *this paragraph* shall not apply to religious, fraternal,

temperance, and scientific, or other similar publications.

Congress certainly thereby intended to exempt those special publications from all the requirements it was imposing; and the "this paragraph" referred to was the *whole* paragraph (including both the "filing" and the "advertisement" portions) and not merely the one "typographical" paragraph in which the words occur.

Congress never intended to exempt religious, etc., publications from the "filing" feature and yet leave them covered by the "advertisement" paragraph.

Furthermore, the "advertisement" paragraph begins with these words:

That all editorial or other reading matter published in any *such* newspaper, magazine, or periodical, etc.—

and the use of the word "*such*" directly connects the two paragraphs by *identifying* the subject matter of the "advertisement" paragraph, to wit, only *such* newspapers, magazines, etc., as are *entered* at the post office as second-class mail.

3. *The purpose of the special penalty for violating the "advertisement" clause.*—The purpose of the special penalty of a fine of from \$50 to \$500 for a violation of the "advertisement" paragraph was this: The Post Office Department would always know in advance whether a newspaper had filed the statement, etc., required by the first paragraph, and consequently could enforce the exclusion from the mails

with promptness and complete accuracy. But there would be no way for the Post Office Department to know in advance whether *all* paid-for articles had been marked "advertisement" and it might not learn of a violation until months afterwards, and in the meantime the paper had received the full use of the mails. It is doubtful whether you could to-day exclude from the mails a newspaper now fully complying with the law on account of a failure to comply six months ago. Therefore the additional penalty of a fine was imposed for violating the "advertisement" paragraph; and in that way you could punish any paper that had used the mails for carrying paid-for articles that were not marked "advertisement."

4. *The true construction that should be adopted.*—If the foregoing argument has been successful it has established, *First*, That Congress did not attempt to regulate *all* newspapers, magazines, etc., but only those that used the second-class mail privileges; *Second*, That Congress prescribed certain things which those publications must do in order to continue the use of the second-class privileges; *Third*, That Congress denied the use of the second-class privileges only to such publications as, after ten days' notice, still refused to comply therewith; and, *Fourth*, That Congress prescribed a moderate fine for any publication which (while complying with the first paragraph and thereby securing the continued use of the mails) inserted paid-for articles without marking them "advertisement."

In substance and effect the statute merely prescribes certain additional conditions to be complied with before newspapers may be admitted to the second-class mail privileges.

III.

Any other construction might invalidate the statute.

Very probably Congress has no power to regulate the press or to say what shall or what shall not go into newspapers, pamphlets, etc.; or to require them to print the names of their bondholders or circulation; or to prescribe how they shall label their articles. If the statute be construed (and especially the "advertisement" paragraph) as attempting to do those things, it may possibly be void.

The construction we have offered is one of which the language is easily susceptible, and which will (as we shall now endeavor to demonstrate) remove all constitutional objections.

Therefore, it should be adopted as the correct construction.

SECOND POINT.

Under the power to establish post offices and post roads Congress has the absolute right to determine what matter may be carried in and what matter may be excluded from the mails, and it may declare the conditions on which it will carry articles and that a given class of matter (newspapers, etc.) shall not be carried at the second-class rate unless such matter conforms to every requirement Congress may prescribe.

The Constitution provides (Art. I, sec. 8):

The Congress shall have power * * *
to establish post offices and post roads.

Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employees, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money-order system, by which more than a half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and criminal schemes impossible to be reached in any other way.

As an incident to that vast development Congress has, and of necessity must have, absolute power to say what it will exclude from and what it will carry in the mails and the terms, conditions, and postal rates on which it will carry mail matter.

1. Accordingly Congress has absolutely excluded from the mails intoxicating liquors, poisons, bad-smelling, explosive, or inflammable articles, live or dead animals, obscene matter, lottery advertisements or letters, threatening or libellous matter on envelopes, etc.; and on many other articles special conditions of admission have been annexed.

2. Under its plenary power, Congress has classified both the matter sent and persons sending it, according to such various bases of classification as to it seemed best, a brief notice of which will be instructive.

*System of Postal Classification.*¹

First-class: Letters and written matter at 2 cents an ounce (or probably 80 cents a pound when underweight letters are considered); and postal cards at one cent each; from which a *profit* of about *seventy million dollars* a year is derived.

Second-class: Newspapers and periodicals at 1 cent a pound, carried at a *loss* of about *seventy millions* of dollars per year.

Third-class: Books and pamphlets at 8 cents a pound, carried at a loss of two million dollars a year.

Fourth-class: Merchandise at 16 cents a pound (one cent an ounce), carried at a profit of nearly three millions of dollars a year.

It is thus seen that for reasons of public policy, which seemed to it sufficient, Congress requires the individual to pay about eighty times as much per pound to get his letters carried as it requires a publisher to pay for sending newspapers through the mails. Books pay eight times as much as newspapers, and merchandise sixteen times as much.

In other words, every man, woman, and child who mails a letter is being overtaxed for the benefit of the publisher. The 90,000,000 of people are

¹ Postal Laws and Regulations (ed. 1902); Message of the President, of February 22, 1912, transmitting the Report of the Commission on Second-Class Mail Matter; addresses of James J. Britt, Third Assistant Postmaster General, March 5, 1911, at Jersey City, and June 14, 1911, at Chicago; Annual Report of Post Office Department for 1911.

being taxed directly for the benefit of 30,000 publishers.

The Government overcharges people who mail letters about \$70,000,000 a year, and that profit all goes to make up the loss sustained by carrying periodicals, etc., at the low second-class rate.

We thus see that Congress has discriminated against the individual and in favor of the publisher. If it had the power to do so, can it not equally well make some changes in that classification? The publishers have no vested right in any particular classification. (*Haughton v. Payne*, 194 U. S. 88, 99.) There is nothing holy in the classification adopted in 1879. Congress can surely increase the second-class rate to two cents a pound, or limit the size or weight of periodicals carried therein. In short, Congress can affix such conditions as it chooses to the right to be admitted to the second-class rate.

Now, that is exactly what it has done by the statute now under consideration.

For more than thirty years Congress has said that newspapers should not be admitted to the second-class mail privilege at the low rate of one cent a pound unless such newspaper or periodical complied with the following conditions (Postal Laws, secs. 427, 428, 438, 440):

(a) That it should be dated; serially numbered; issued regularly at least four times a year from a known office; unbound; have a legitimate list of subscribers; and not be primarily designed for advertising purposes.

(b) That it should file a sworn statement giving a lot of information as to its *proprietors*; *editors*; their *financial interest* in the trade represented by the publication; its *circulation*, etc.

(c) That it should print on each issue the words "Entered ----- at the post office at ----- as second-class matter," etc.

The present statute merely extends those requirements to a comparatively slight degree. It requires the names of the stockholders and bondholders to be furnished, and that twice a year the paper shall publish the same information (which for thirty years the law has required to be given to the Post Office Department), with the addition of the names of the stockholders and bondholders. It also adds the new requirement that paid-for matter shall be labelled "advertisement."

It is at once seen that the additional requirements are not revolutionary, and are nothing like as great an extension over the existing requirements as they in turn were over those previously in force.

The object of the foregoing discussion has been to direct attention very sharply to the fact that the very favorable privileges now enjoyed by the newspapers were the result of the exercise by Congress of its power of classification in their favor and against the public generally; and further, that the provisions of the statute now assailed are along the same line as the unquestioned provisions of thirty years' standing,

defining the conditions of admission to second-class privileges.

It must always be remembered that, construed as we have contended (p. 3, 4, *supra*), the statute does not attempt to regulate or censor the press, but merely adds to the existing law certain new conditions to which newspapers must conform in order to receive the benefit of the exceptionally favored rate of second-class postage, which is maintained by virtue of a tax on the people as a whole; and the people as a whole, acting through Congress, have prescribed the terms on which they will continue to extend such favored rate. The newspapers can comply and obtain the benefit or they can refuse to comply and use a less favored method of transmitting their papers. (*Noble State Bank & Haskell*, 219 U. S., 575, 580.) Or, what is probable, some will do one thing and others the other.

For more than thirty years Congress has said to the newspapers:

“We have established the very low rate of postage of one cent a pound (free within the county of publication) for those publications which comply with certain conditions. If you satisfy the Postmaster General that you comply with those conditions, you may be allowed to use the mails at the low rate.”

No one has ever questioned the power of Congress to attach such conditions, and thereby grant to newspapers a postal rate far lower than other persons could have for distributing books, circulars, manuscripts, etc.

Now Congress has simply added additional conditions to second-class mail matter, to wit, it says to the newspapers in effect:

"If you desire to continue using the low rate we gave you years ago, you must have your paper show what articles are advertisements, the name of the editor, the extent of the circulation, etc. If you do not care to do that, you cannot have the low second class rates, for they are only established for those papers. You can use the mails, but not at those rates, for they do not apply to such character of papers as yours."

Has not Congress the same power to-day to say that to the newspapers as it had thirty years ago to say to the great book publishers:

"You cannot send your books at one cent a pound because you do not comply with the conditions we have established for this specially favored mail matter." (*Houghton v. Payne*, 194 U. S. 88.)

No one doubted then the power of Congress to give to newspapers an advantage over book publishers or over private correspondence; and so now Congress merely limits that low rate to newspapers of a certain kind. No one has a vested right to use the mails at any given postage rate. (*Houghton v. Payne*, 194 U. S. 88, 99.) Congress has merely changed the rate. Newspapers that have had a cent a pound rate must now pay six cents; but they can obtain the one cent rate if they comply with the new requirements, just

as in 1879 they had to comply with certain new stipulations in order to get the special rate then established.

Suppose when the present second-class mail privilege was created in 1879 Congress had named as one of the conditions that the papers should publish semiannually their circulation, and the names of their owners, editors, publishers, etc., and mark all paid-for articles "advertisement." Surely no one would have said that there was anything in such conditions that rendered them more illegal than the conditions Congress actually imposed at the time. And if Congress could have imposed them when it *first* created second-class mail privileges, can it not equally well now add them as *additional* conditions?

In short, are not the requirements of the act in question merely elements going to define that class of mail matter which Congress says can be carried at one cent a pound? How can the press or any other class of our citizens claim to have a right to any particular postage rate or be admitted to a particular postal classification unless they conform to the rules by which such classification is created?

3. Having heretofore discussed the matter upon general principles, a consideration of the authorities will now be helpful.

In *Ex parte Jackson*, 96 U. S. 727, a Federal statute forbade the admission to the mails of any letter or circular concerning lotteries. The constitutionality of the statute was sustained upon the ground that

Congress had the right to say what should and what should not be admitted to the mails. The court said:

The validity of legislation prescribing what should be carried * * * has never been questioned. * * *

The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. * * *

In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.

The court then quoted the statute against mailing obscene matter and continued (p. 736):

All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people.

In *In re Rapier*, 143 U. S. 110, 133, the constitutionality of the antilottery act of 1890 was sustained. The act prohibited the transmission in the mails of any newspaper containing a lottery advertisement. The court adhered to its ruling in *Ex parte Jackson*—

that the power vested in Congress to establish post-offices and post-roads embraced the regu-

lation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden.

The court then said "that mail facilities are not required to be furnished for every purpose" because when the States surrendered to Congress the power to establish post offices and post roads "it was as a complete power," and that—

it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

In *Public Clearing House v. Coyne*, 194 U. S. 497, the postmaster at Chicago stamped as "fraudulent" and returned to the senders all mail addressed to the plaintiff upon the ground that the plaintiff was using the mails to obtain money by false pretenses. In dismissing the plaintiff's bill for an injunction, this court said (p. 506):

The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years the transmission of private letters was eithe

trusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high and the methods of transmission so slow and uncertain that it was not until 1845, when the postage was reduced to five and ten cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses. * * *

The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded, and that in the enforcement of regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guarantee against unreasonable searches and seizures extended to letters but did not extend to printed matter.

In establishing such system Congress may restrict its use to letters, and deny it to peri-

odicals; it may include periodicals, and exclude books; it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employes or injurious to other mail matter carried in the same packages. * * *

While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality.

For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitution-

ality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *In re Rapier*, 143 U. S. 110.

The rule to be extracted from the foregoing decisions is that the power of Congress over the postal system is plenary, and that it may in its own uncontrolled discretion say what shall be carried and what shall not be carried; and it may classify not only the recipients of mail matter, but also (1) the senders and (2) the mail sent, according to such rules as to it seem best.

If it be argued that Congress has no power to impose conditions concerning what shall be printed or omitted from printing in the papers mailed, except to exclude matter that it deems obscene, immoral, or otherwise injurious to the public welfare, and therefore can not exclude a paper because it does not disclose its editor or which of its articles are subsidized (those not being moral qualities), we reply that there is no distinction in the congressional power over things commonly called *mala in se* and those that are *mala prohibita*; and that when Congress says a particular form of printed matter is objectionable and can not go through the mails, it becomes as unmailable as the most obscene or immoral letter, *simply because Congress says so*. This court disposed of that very contention in *In re Rapier*, where, in response to that

precise argument by the late James C. Carter, it said (p. 134):

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, *since it would be for Congress to determine what are within and what without the rule*; but we think there is no room for such a distinction here, and that *it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.*

We submit, therefore, that Congress has the unrestrained power to say what in its opinion is so hurtful to the public welfare that it shall not pass through the mails; and it may enforce that opinion without its correctness being subject to judicial review. But it must be always remembered that in the case at bar, Congress has not undertaken to exclude the newspapers from the mails, but only to exclude them from the extraordinary privilege of cent-a-pound postage unless they conform to Congress' ideas as to publicity.

4. When, therefore, Congress declared that newspapers should be excluded from the second-class mail privileges unless they would *first* file with the Post Office Department and semiannually publish a statement giving the names of its editor, publisher, owner, etc., and, *second*, mark all paid-for articles "advertisement," it was only doing exactly what this court has said it may do, namely, exercising its "right to determine what shall be excluded" (*Ex parte Jackson*) and exercising its "sound discretion to determine in what manner it will exercise the power it undoubtedly possesses" (*In re Rapier*), and "refuse to include in its mails such printed matter as may seem objectionable to it upon the ground of public policy" (*Public Clearing House v. Coyne*).

No one has ever questioned the right of Congress to prescribe as a condition of admitting a newspaper to the second-class mail privileges that it shall file sworn statements telling (1) who are its editors and proprietors, (2) what interest, if any, they have in any business advertised therein, (3) whether the advertising columns are open to all (including competitors), (4) the number of copies printed, etc. (Postal Laws, sec. 438); and if Congress has all that power, surely it may increase its requirements to the extent embodied in the act under consideration.

A RESPONSE TO APPELLANTS' ARGUMENT THAT CONGRESS HAS NO POWER TO ENACT THE STATUTE IN QUESTION.

1. The entire argument submitted by appellants to show the lack of power in Congress to enact this statute is based upon what, we think, is an erroneous construction of the act.

For the purposes of argument we may concede appellants' contention that Congress has no express or implied power to require newspapers generally to furnish information as to ownership or to mark paid-for articles "advertisement," but such an argument is inapplicable, because the statute, properly construed, does not attempt to control newspapers as such, but it applies (1) only to newspapers desiring to use an *instrumentality* exclusively under the control of Congress pursuant to an express grant of power, and (2) only to the *extent of such use* of that Federal instrumentality, and (3) even then only to one limited and highly favored use thereof.

As Congress has the express power to establish postal facilities, it necessarily has the power (no matter whether you call it express or implied) to determine what shall be carried by the system it has created. Once admit that premise, and it follows that it may prescribe the *conditions* on which it will carry such articles. It surely may prescribe any conditions concerning the mail matter itself, whether as to size, weight, character of contents, purpose for which sent, etc., and it may likewise prescribe conditions concerning the person

In Mr. Beck's brief as finally printed, he has slightly changed this quotation, which we took from the advanced copy furnished us.

Answering his new brief as to whether Congress could deny a physician the use of the mails unless he filed a statement of his name, property, patients, etc., we reply that it is not necessary to decide that point, for such requirements do not bear any relation to the things mailed; but Congress might be able to say that no physician should deposit any printed matter in a particular class of mails unless such printed matter showed those very things. (See p. 38-40 of brief for U. S.).

depositing it in the mail, especially if the conditions attached to the sender bear some relation to the thing sent.

2. Appellants urge that Congress has no power to compel citizens to do things in themselves beyond the power of the Federal Government to compel, under penalty of a denial of some valuable privilege under the Constitution, such as the facilities of interstate commerce, citing the *Employers' Liability Cases*, 207 U. S. 463, 502, to the effect that merely because corporations are engaged in interstate commerce Congress has no right to regulate them or their business apart from such interstate business; and counsel add (brief of James M. Beck, pp. 19, 20):

Is it a due regulation of the mails for the Federal Government to say to a citizen, "Unless you do certain things, which we have not otherwise the power to compel you to do, we will deny you the facilities of the mail"?

Could Congress provide that every editor and publisher should vote the prohibition ticket, support the Suffragette cause and appropriate half of his publication to educational reading matter, under the penalty of exclusion from the mails? Could Congress provide that no religious institution could use the mails, unless it made a public statement of the value of the church property, its indebtedness and the names and addresses of its governing body?

We respond:

A. It is not necessary to decide whether Congress could exclude from the mails all articles sent by a

prohibitionist or a suffragette or religious institution, for, obviously, those conditions would have no possible relation either to the *articles* mailed or to the *use* of the mails. But Mr. Beck's illustration as to requiring half the publication to be educational reading matter was most unhappily chosen for the sake of his argument, as by the acts of July 16, 1894, and June 6, 1900 (Postal Laws, secs. 429, 430, 439), publications of certain societies and institutions of learning were required to be *wholly devoted* to such purposes, and State agricultural publications could contain nothing else, not even advertising matter, until the act of August 24, 1912, 37 Stat. 539, 551, changed the law. So we see that Congress *has for years* exacted one of the very conditions which Mr. Beck cites as an illegal condition.

Congress can attach the condition that half or the whole of the publication shall be devoted to educational reading matter, because that would be a condition attached to the *thing mailed*; and, indeed, the present second-class mail conditions are substantially that, to wit, that the *whole* publication shall be devoted to the dissemination of information of a public character, etc.

Here the conditions all relate to the condition of the *articles* mailed, to wit, they must have paid-for matter marked "advertisement," have the amount of circulation, and the names of the editors, owners, etc., printed twice a year in the *paper mailed*; while the only condition attached to the sender is the mere

filing, semiannually, of the required statement, which in turn must be published in the paper, so even the one condition attached to the sender has a direct and immediate relation to the thing mailed, as it is the necessary preliminary to getting the information which is to be printed in the thing mailed, and hence is entirely different from a requirement that the sender shall vote the prohibition ticket or support the suffragette cause.

B. For the purposes of argument we may concede his contention, but it is inapplicable. Congress does not say that it will exclude a person from the use of the mails unless such person will do something beyond its power to compel and having no relation to the use of the mails; but Congress only says that if certain *articles* are to be carried in the mails (or rather in one specially favored class of the mails) such *articles must possess certain characteristics* (*i. e.*, contain the label "advertisement" and twice a year the names of the owner, editor, etc.); and as these requirements apply to the *very things themselves* which are the direct object of action by an undoubted power of Congress, they relate directly and immediately to the subject over which Congress has plenary power, to wit, the transportation of articles by mail.

C. The ground of the decision in the *Employers' Liability Cases* was that while the statute was addressed to persons engaged in interstate commerce it was not confined to regulating the interstate commerce, which such persons may do, but undertook to regulate not the commerce, but the *persons*; and to

regulate not their actions in relation to commerce, but to regulate them in other respects simply *because* they engaged in such commerce.

To make the correct analogy it may well be that merely because a corporation uses the mails Congress has no power to regulate (for example) the insurance business such corporation is engaged in; but it may be quite competent for Congress to say that all *matter* transmitted by insurance companies in the mails should possess such and such qualifications or be excluded.

D. The fundamental fallacy which in one form or another underlies the entire argument of both appellants' briefs is the assumption that the act in question is a regulation of the private business of citizens in a manner beyond any express or implied power of Congress, and that it imposes as a penalty for disobedience a denial of an important Federal privilege which Congress controls. But counsel wholly overlook the controlling fact that the regulation complained of is *not* one which merely applies to the private business of the citizen disconnected from any relation to a Federal power, but is one which directly applies to the *very object* on which the Federal power directly operates, to wit, the *articles* carried by the Federal Government in its mails.

3. The appellants approach the subject with the premise that the purpose of giving to Congress the power to establish post offices and post roads was

simply to enable Congress to furnish mail facilities to carry whatever *the people* desired to transmit, and consequently any legislation that was not appropriate and plainly adapted to *that* end is void. But the vice in the argument is seen in the italicized words. Congress was to give facilities for carrying what *it* thought should be carried; not what the *people* thought should be carried. And, therefore, Congress has the absolute power to say what shall be carried by *its* instrumentalities.

Applying what Mr. Beck calls Chief Justice Marshall's "acid test," we insist that in determining *what* shall be carried in the mails (which is surely a legitimate end under the power to establish post offices and post roads), its requirements as to the *characteristics* of the articles to be so carried are appropriate means and plainly adapted to the end of determining *what* shall be carried. That being so, there can be no inquiry as to the nature of the characteristics which Congress affixes to the articles as conditions of their transportation.

4. Mr. Beck argues that by the act in question Congress assumes to exercise a power over the private affairs of people not granted by the Constitution. We reply that the power is not exerted upon the *people* (over which we concede it was *not* granted), but upon the *mails* over which it *was* granted.

Again, we insist that Congress is not attempting to do indirectly what it could not do directly; but

it is doing *directly* what it has the right to do, and it is immaterial that it may thereby indirectly accomplish something it could not do directly; for if some persons in order to obtain benefits under such direct action voluntarily choose to do things which Congress would be powerless to compel them to do, then that is a mere indirect result not affecting in any wise the exercise by Congress of its direct power.

In *McCray v. United States*, 195 U. S. 27, a Federal tax on oleomargarine was so heavy as to prohibit its manufacture within the States. As Congress would have no power to prohibit the manufacture of oleomargarine, the statute was attacked as unconstitutional upon the ground that Congress was using the taxing power to destroy something it had no right directly to prohibit. This court held the statute valid upon the ground that it could not go into the purpose or motive actuating Congress, but that as Congress had the power to tax, it could tax what it pleased and as heavily as it pleased.

So here, as Congress has the right to determine *what* shall be admitted to the mails, it can fix such conditions as it pleases, even though the practical necessities of the situation (resulting from competition among newspapers) are such that every newspaper will have to submit rather than surrender the low postage rate, and the *effect* may be for newspapers to make disclosures which Congress could not directly compel to be made.

THIRD POINT.

The statute is not a law "abridging the Freedom of the Press."

1. The late James C. Carter, in his briefs filed in *In re Rapier*, 143 U. S. 110, *France v. United States*, 164 U. S. 676, and *Francis v. United States*, 188 U. S. 375 (and Hannis Taylor in his brief in the *Rapier* case), thrice submitted an absorbingly interesting historical review and elaborate argument designed to show (1) exactly what the phrase "freedom of the press" imported at the time of the adoption of the First Amendment, and (2) that the anti-lottery statutes, in excluding from the mails newspapers containing lottery advertisements, abridged the freedom of the press by curtailing or diminishing the freedom of circulation of papers by mail, which was claimed to be the principal mode of circulation at the time the First Amendment was adopted.

Thrice this court rejected those arguments upon the ground that Congress could prescribe what should be carried in the mails and its exclusion of any particular matter was no interference with the freedom of the press. The historical review and arguments now presented by Mr. Beck (pp. 32-44) and Mr. Morris (pp. 29-41) are identical with Mr. Carter's argument and contain but one new suggestion, to which we will hereafter direct attention.

Mr. Carter contended that the "Freedom of the Press"—

"imported that measure of liberty which permits, without previous restraint, the publica-

tion of any writing whatever, and without the restraint of any subsequent penalty, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous." See p. 73 of brief in *Rapier* case and p. 48 of brief in *France* case.

This court thus disposed of his contention in the *Rapier* case (p. 134, 135):

* * * Nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communications is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In *Patterson v. Colorado*, 205 U. S. 454, 462, this court said with reference to the constitutional prohibition against the abridgment of the freedom of the press:

The main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be

deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick, 304, 313, 314; *Respublica v. Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ibi. sup.*; 4 Bl. Com. 150.

Conceding for the purposes of this argument that the freedom of the press imports just what Mr. Carter and Mr. Taylor contended for, it is a sufficient response to say that the present statute (construed as we have urged it should be) does not attempt to say what *shall or shall not be published*, nor to prohibit the *circulation* of newspapers; but it only declares that the specially low rate of one cent a pound shall apply only to such newspapers as comply with the required stipulations.

So construed, there is no limitation on the power of the press to publish what and how it pleases, and to circulate as it pleases, save that it can not have the second-class postal rate unless it conforms to the statute. But that is no more an abridgment of the Freedom of the Press than the statute requiring newspapers to have a legitimate list of subscribers and to be issued from a known office of publication, dated and serially numbered, etc.

Appellants attempt to distinguish the exclusion of lottery matter from the mails upon the ground that lotteries were immoral; and they concede that Con-

gress has the power to exclude matter injurious to the public health, morals, or safety. But in the *Rapier* case it was contended that lotteries, at the time of the adoption of the First Amendment, were not deemed immoral by the principles of what Mr. Beck now calls "axiomatic morality," and therefore Congress had no right to exclude them; and Mr. Carter evolved his theory of *mala in se* and *mala prohibita*, which this court summarily rejected. 143 U. S. 134; p. 34, *supra*.

Congress, from time to time, has the absolute right to determine for itself whether this or that matter is injurious to the public and therefore should be excluded from the mails or from some favored use thereof.

2. In so far as the argument for the Journal of Commerce proceeds upon the theory that the statute dictates to newspapers what they shall or shall not publish under penalty of a fine, there would be great force in it if the statute be given that construction; but construed as a mere condition of admission to the mails with a fine for using the mails without complying with the statute, the argument fails.

Again, in the brief for the Journal of Commerce (p. 39) it is suggested that if this act be upheld there will be nothing to prevent Congress from denying the use of the mails to (or fining) newspapers which are owned by individuals advocating certain political theories. A possible abuse of power is no argument against its existence, but we may as well observe that

a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal (p. 38-40, *supra*), as having no relation to the thing carried in the mails *unless the views are expressed in the paper*; but if such views are expressed in the paper Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff if a majority of Congress thought such views against public policy.

3. In one aspect the argument submitted by Mr. Beck takes a wider range than Mr. Carter's. In so far as he contends that the Freedom of the Press means the liberty of free discussion in print without previous restraint or subsequent penalty save as imposed by the law of libel, we may concede his point and reply that the statute properly construed does not impose either previous restraint upon or penalty for publishing anything, nor does it interfere with the *circulation after printing*, save only in the one mode of second-class mail.

But he goes further and argues that the Constitution protects the press from any restriction upon its rights or impairment of its influence; and that the press does not have the same full, free, and unimpaired right to print and circulate as it had before the law was passed. But he "begs the question," for what are its "rights" and what is meant by "impairing its influence"? If the rate of postage were raised or the size of the newspaper limited it

would not have the same full, free, and unimpaired rights that it had before, and yet no one would say its freedom had been abridged.

Mr. Beck argues (1) that a compulsory disclosure of circulation will impair the value of small newspapers as advertising agencies, and thus injure them financially; (2) that the disclosure of editorial identity abridges the right to disseminate ideas impersonally as "Junius," "Publius," etc., did; and (3) that the requirement of marking subsidized articles "advertisement" does not leave the press as free as it was before.

In reply, we can only repeat our former argument that such requirements, standing alone and emanating as a regulation by Congress upon the press, may well be unconstitutional, but when such results are not imposed absolutely but only as conditions to the exercise of a privilege wholly under congressional control, Congress may annex such terms as it desires as conditions to the use of its privileges.

Unquestionably, Congress, through the control over the mails, can as a price for using them compel a certain acquiescence in its views which the paper may prefer to pay rather than lose the use of the low postage rate; but even so, that is no abridgment of the full and free right to print and circulate anything the paper pleases, for there are many ways of circulation other than the one-cent-a-pound second-class rate.

FOURTH POINT.

The statute does not deprive appellants of either liberty or property without due process of law, nor does it take private property for public use without just compensation.

1. The requirement that the statement as to editors, owners, publishers, bondholders, circulation, etc., shall be published semiannually is not, as appellants argue, an appropriation of valuable private property (*i. e.*, advertising space in a newspaper, with the attendant cost of typesetting, printing, etc.) for public use without compensation, but it is merely a requirement as to what the paper must contain in order to receive the low postage rate. It is not compulsory but optional with the paper whether it will do so or not. If it refuses, it simply does not come within the class entitled to the lowest postage rate. If it complies, it receives its compensation a thousandfold in the almost nominal rate it pays for transmitting its papers. The present law requires each issue of a paper to print "Entered as second-class matter," etc. The new requirement is but a trifle more burdensome.

In *Noble State Bank v. Haskell*, 219 U. S. 104, 110, involving the Oklahoma Bank Guaranty law, this court said:

Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation.

There is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. *Clark v. Nash*, 198 U. S. 361. *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531. *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372. *Bacon v. Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

In short, where the Oklahoma legislature declares by implication that free banking is a

public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards, this court certainly can not say that it is wrong.

And upon a petition for rehearing this court said (219 U. S. 580):

Clark v. Nash, 198 U. S. 361; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, etc., were cited to establish, not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private.

2. The same considerations demonstrate that there is no deprivation of liberty or property without due process of law, for the act does not require the things done but makes them mere optional conditions to the exercise of a right which Congress has absolute power to grant or refuse with or without conditions. The statute does not compel the citizen to disclose his private affairs nor to publish them to the world. It merely says that he must make certain disclosures if he desires to use a special privilege, leaving it optional with him to do it or not.

In *Noble State Bank v. Haskell*, 219 U. S. 575, 580, it is said:

For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the State.

3. It is argued that as publishers are singled out from all other citizens and required to make these disclosures, there is an arbitrary discrimination violative of fundamental constitutional rights. It is sufficient to say that the same principles which support the right of Congress to classify publishers so as to grant them a cent a pound rate (while other persons pay many times that on their articles), will support the right to say that those using that classified low rate, must, in consideration therefor comply with the statute.

If it is legal to give newspapers a rate of postage lower than other persons pay, then no objection can be fairly made, because as a condition of such a low rate the same favored class have special burdens imposed as conditions to the exercise of such right.

FIFTH POINT.

A court of equity will not, by injunction, restrain the prosecution of criminal proceedings.

In so far as the Journal of Commerce seeks to enjoin the Attorney General and the United States district attorney from instituting criminal proceedings to enforce the fine for sending paid-for articles through the mails without marking them "advertisement," it is clear that a court of equity has no jurisdiction to entertain a bill of that kind. *In re Sawyer*, 124 U. S. 200, 210-211, and cases cited; *Harkrader v. Wadley*, 172 U. S. 148, 170; *Fitts v. McGhee*, 172 U. S. 516, 531-533; *Hemsley v. Myers*, 45 Fed. 283; *Wagner v. Drake*, 31 Fed. 849; *Logan v. Postal Tele-*

graph Co., 157 Fed. 570; 2 Story Eq. Jur., sec. 893; High on Injunctions, 4th ed., sec. 68; Joyce on Injunctions, secs. 58-60a.

The present case, involving merely small fines, does not fall within any of the exceptions to the rule, such as where the penalty would amount to confiscation, etc.; and the bill was rightfully dismissed, without regard to the constitutionality of that feature of the statute.

The Morning Telegraph, in its bill, does not seek to enjoin any criminal proceedings, but apparently construes the statute to deny the use of the mails for a failure to mark such articles "advertisement." Therefore, it presents a proper case for the consideration of the validity of the act.

SIXTH POINT.

If the "advertisement" paragraph should be held void, it should not affect the validity of the balance of the statute.

In the event that the court should not adopt our construction that compliance with the "advertisement" paragraph was a mere condition to the use of the mails, and should declare it unconstitutional as (1) a direct abridgment of the freedom of the press, or (2) an exercise of a power nowhere given to Congress, then the balance of the section is clearly separable and can stand alone.

The constitutional part of a statute partially unconstitutional will be enforced where the parts are so distinctly separable that each can stand alone and

where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable even though the other part should fail. *Bank of Hamilton v. Dudley*, 2 Pet. 492, 526; *Field v. Clark*, 143 U. S. 649, 695-697; *Income Tax Cases*, 158 U. S. 601, 635-636; *Trade-Mark Cases*, 100 U. S. 82, 98-99; *Baldwin v. Franks*, 120 U. S. 678, 687-688; *Poin-dexter v. Greenhow*, 114 U. S. 270, 304-305; *Employers' Liability Cases*, 207 U. S. 463, 501; *Packet Co. v. Keokuk*, 95 U. S. 80, 89; *Presser v. Illinois*, 116 U. S. 252.

CONCLUSION.

The decrees below should be affirmed.

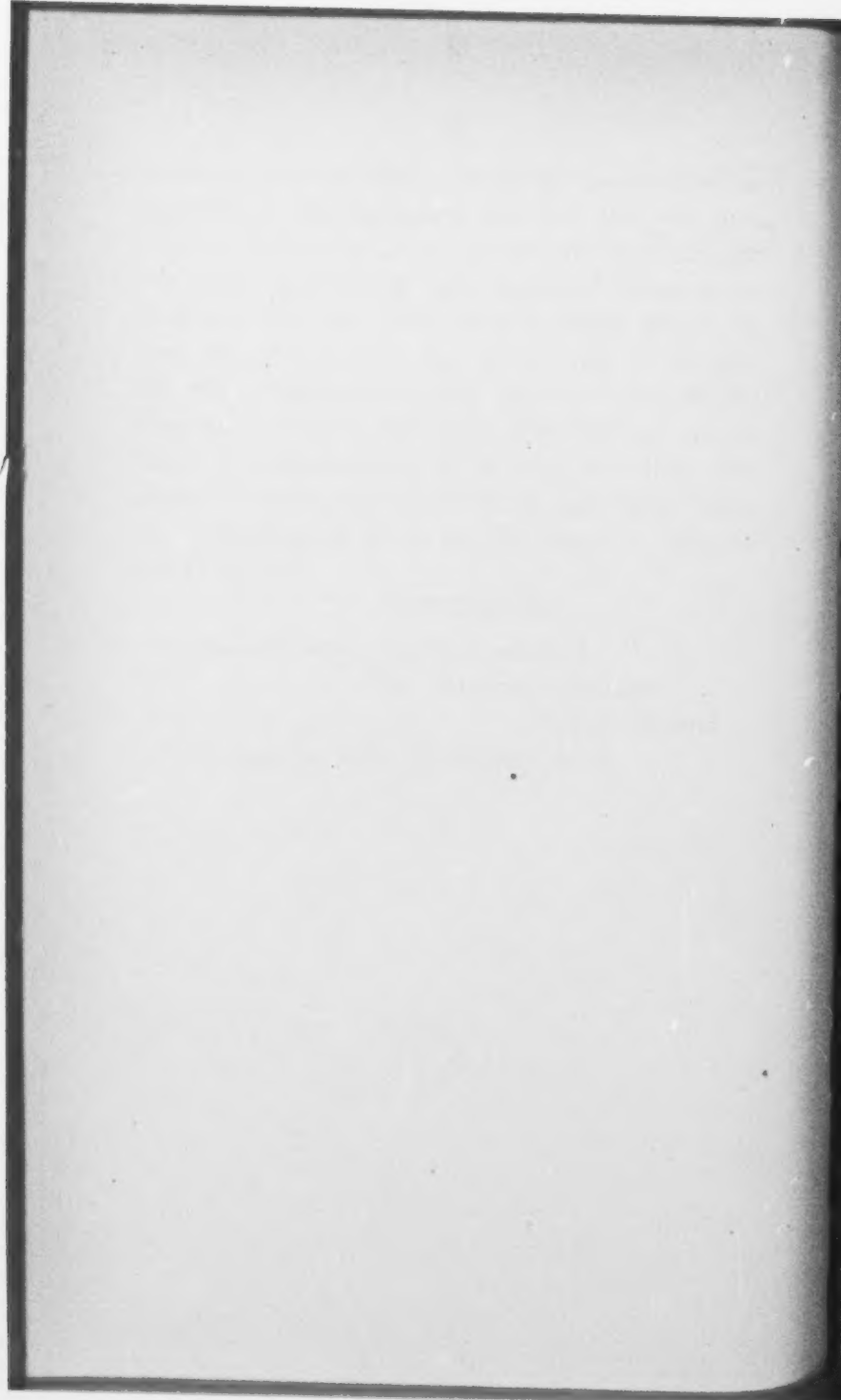
WM. MARSHALL BULLITT,

Solicitor General.

26 NOVEMBER, 1912, Washington, D. C.







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FILED.

MAR 11 1913

JAMES H. MCKENNEY,

CLERK.

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL
BULLETIN,

Appellant,
against

FRANK H. HITCHCOCK, as Postmaster General
of the United States of America, GEORGE W.
WICKERHAM, as Attorney General of the
United States of America, EDWARD M.
MORGAN, as Postmaster of the United States
of America, in and for New York City,
Borough of Manhattan Post Office, and
HENRY A. WISE, as District Attorney of the
United States, in and for the Southern
District of New York,

Appellees.

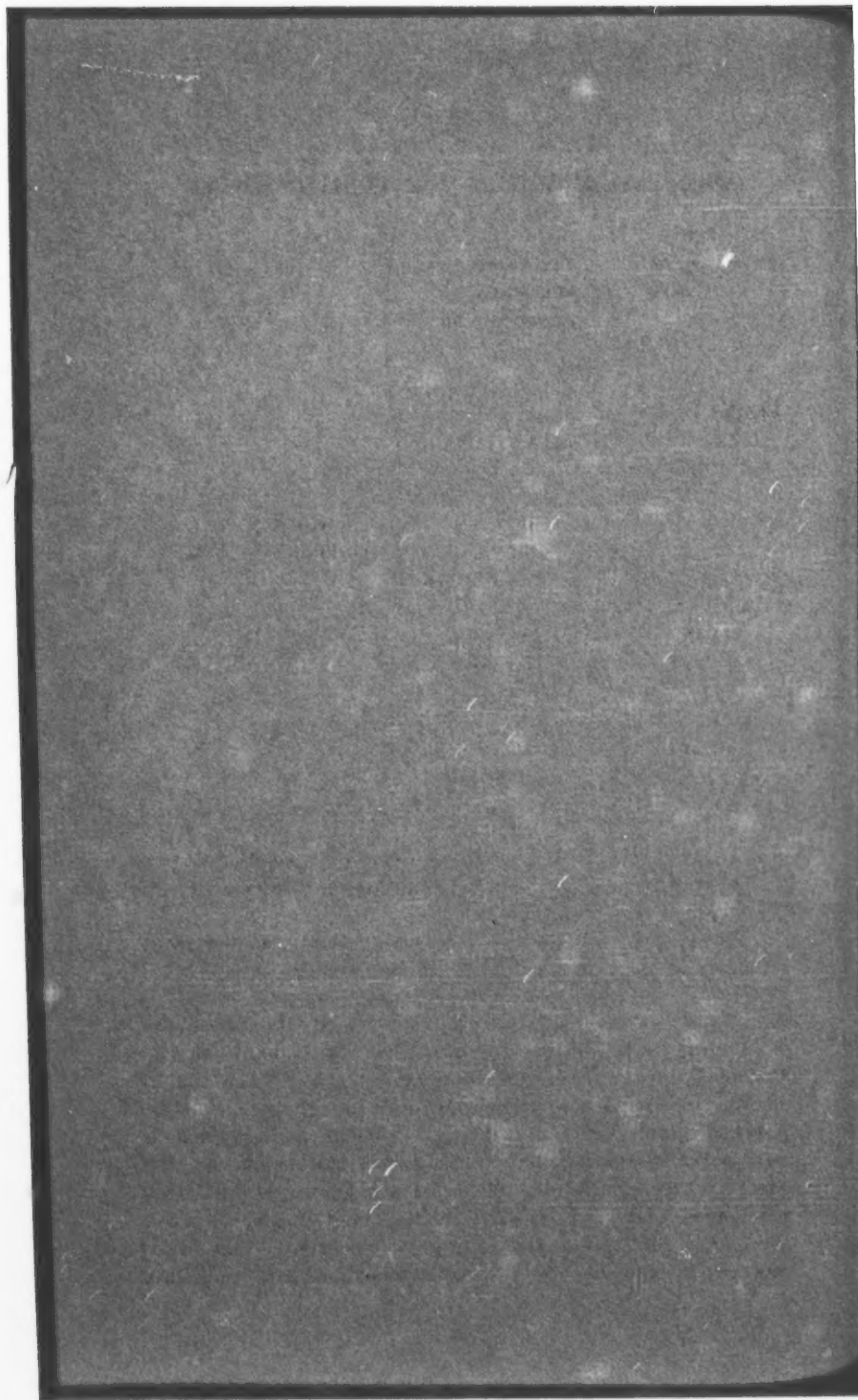
No. 818.

October Term, 1912.

MOTION BY APPELLANT FOR RESTRAINING ORDER.

ROBERT C. MORRIS,

Of Counsel for Appellant.



Supreme Court of the United States.

THE JOURNAL OF COMMERCE AND
COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster General of the United States of America, GEORGE W. WICKERSHAM, as Attorney General of the United States of America, EDWARD M. MORGAN, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and HENRY A. WISE, as District Attorney of the United States, in and for the Southern District of New York,

Appellees.

No. 818.
October Term, 1912.

The petition of The Journal of Commerce and Commercial Bulletin, the appellant above named, respectfully shows to this Court :

That this action, commenced by the filing of the complainant's bill in the District Court of the United States, for the Southern District of New York, on the 9th day of October, 1912, was brought to restrain the defendants from enforcing certain provisions of Section 2 of the Postal Appropriations Act of August 24th, 1912, which in substance provides that the owner of a newspaper or other publication shall file with the government and publish in such newspaper twice each year a sworn statement showing, among other things, the names of its known bondholders, mortgagees and other security holders, and if a corporation, the names and addresses of its stockholders; that daily newspapers shall include in the statement filed and published

the average number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months, the penalty for non-compliance being a denial of the privileges of the mail; and which further provided that all editorial or other reading matter published in such newspaper, magazine or periodical, for which money or other valuable consideration is paid, accepted or promised shall be plainly marked "advertisement," under penalty of a fine of not less than \$50 nor more than \$500.

Immediately upon the enactment of said statute it was seen that the provisions above referred to would work irreparable injury to the complainant and many thousands of newspapers scattered throughout the entire United States, and counsel for the complainant, representing the complainant and the members of the American Newspaper Publishers Association, conferred with the Department of Justice and the then Attorney General, Honorable George W. Wickersham, and with the Post Office Department and the then Postmaster General, Honorable Frank H. Hitchcock, with a view to the commencement of an appropriate action wherein the constitutionality of the aforesaid provisions of said Act of August 24th, 1912 could be determined expeditiously and whereby an understanding could be reached as to the enforcement of such provisions, pending the final determination of such contemplated action.

That counsel herein for the complainant commenced this action and the defendants for the purpose of facilitating the action voluntarily appeared herein. That thereafter a decree was entered herein in said District Court of the United States, for the Southern District of New York on the 15th day of October, 1912, sustaining the demurrer of the defendants and dismissing the bill, whereupon the appellant perfected its appeal to this Court and filed the record on appeal with the Clerk of this Court on October 17th, 1912.

That on the 21st day of October, 1912, a motion to advance said appeal for argument was made to this Court in which motion the Solicitor General of the United States concurred, and thereafter such motion was granted and this appeal set for argument and thereafter duly argued on the 2nd and 3rd days of December, 1912.

That at the time of the taking of said appeal and during

the proceedings aforesaid, it was agreed between counsel for the appellant, the Department of Justice and the Post-Office Department that pending the decision by this Court upon said appeal in this case no action would be taken by the Post-Office Department to either compel the appellant or other newspaper publishers throughout the country to comply with the aforesaid provisions of said Act of August 24th, 1912, or to enforce against them the penalties for non-compliance or to deny to them the privileges of the mail upon their failure to file and publish the required statements. That the only condition attached to such understanding was the condition that counsel for the appellant should prosecute this appeal with all reasonable diligence, so that the questions involved might be presented to this Court for determination without undue delay.

That in consideration of the making of said agreement and at the request of the Department of Justice counsel for the appellant refrained from applying to the District Court of the United States, for the Southern District of New York, for a temporary injunction restraining the defendants from enforcing said statute until the final determination of the action and entered into an arrangement with the Department of Justice whereby to expedite a final decision in this case, no application for an injunction was made, but a *pro forma* decree was entered upon the defendants' demurrer dismissing the bill of the appellant.

That notwithstanding the agreement so made for the non-enforcement of said statute pending the decision of this Court, appellant, on the 5th day of March, 1913, received, as publisher of The Journal of Commerce and Commercial Bulletin and as publisher of The Review, from the defendant Morgan, two letters in the following form :

" POST OFFICE, NEW YORK, N. Y.

" Office of the Postmaster

" MARCH 4, 1913.

" PUBLISHER,

" ' Journal of Commerce and

" Commercial Bulletin '

" DEAR SIR :

" As no statement of the ownership, management,
" etc., of your publication for October 1, 1912, has been

" filed as required by the Act of August 24, 1912,
 " you are hereby notified by direction of the
 " Third Assistant Postmaster General that *unless such*
 " *statement is filed at once*, setting forth the matters
 " required to be reported on October 1, 1912, the
 " registered notice contemplated by the following pro-
 " vision of the Act will be given by the Department :

" ' Any such publication shall be denied the priv-
 " ' ileges of the mail if it shall fail to comply with
 " ' the provisions of this paragraph within ten days
 " ' after notice by registered letter of such failure.'

" Two copies of Form 3526 for the sworn statement
 " referred to have already been furnished to you, but
 " if it is your intention to file the statement and addi-
 " tional forms are desired for this purpose they may
 " be obtained at Room 4, General Post Office.

" The statement must be made in duplicate and
 " both copies should be sent to Room 4, General Post
 " Office, without delay, as prompt report will be made
 " to the Department of any publisher failing to file this
 " return.

" Very respectfully,

" EDWARD M. MORGAN,

" Postmaster."

That similar letters were also sent by the Post Office De-
 partment to and received by all other newspaper publishers
 throughout the country who had not complied with said Act
 of August 24th, 1912.

That immediately after the receipt by appellant of such
 notice counsel for appellant conferred with the Third As-
 sistant Postmaster General, Honorable James J. Britt, with
 the present Postmaster General of the United States, Honor-
 able Albert S. Burleson, and with Honorable William Marshall
 Bullitt, the Solicitor General.

That the agreement and understanding with respect to the
 non-enforcement of the statute as above recited was recognized
 by Mr. Bullitt and by Mr. Britt, but that Mr. Britt and Mr.
 Burleson have refused to further abide thereby and have given
 verbal notice to counsel for appellant that they intend to fully
 enforce said statute and that, unless the required statements

are filed by appellant and other newspaper publishers on or before the 11th day of March, 1913, they will cause to be sent to each such publisher neglecting to file such statement, the notice by registered mail contemplated by said statute and set forth in the afore-recited letter ; and that thereafter at the expiration of the ten days from the receipt of such registered notice will deny to all newspaper publishers, including appellant, the privileges of the mail if at that time the required statements have not been filed with the Post Office Department and published.

That if the defendants and their successors in office be permitted to proceed as they are now threatening and about to do the appellant and thousands of other newspaper publishers similarly situated will be denied the privileges of the mail and will be irreparably injured unless they comply with the provisions of said statute and in either event will be prevented from receiving the benefits of the decision of this Court should this Court determine said statute in all or any of its provisions to be unconstitutional and invalid.

That appellant has brought this action in good faith and has prosecuted this appeal with all due diligence, and appellant believes it unfair that at this time it should be put in a position where it will be deprived of the benefits thereof if this Court should subsequently sustain its contention that said statute is unconstitutional and invalid. That appellant in good faith and at the suggestion of the defendants adopted the procedure had in this case and in reliance upon the agreement with the defendants and at their request waived its right to apply for an injunction to prevent the enforcement of the Act and having so relied upon the understandings had with the defendants now believes that it should not be made to suffer for matters beyond its control nor deprived of the benefits that this action may ultimately afford it.

The Solicitor General of the United States has accepted service of this motion.

WHEREFORE appellant respectfully prays this Court to grant herein an order restraining the defendants or their successors in office, as the case may be, and all persons acting through or under them, until the decision of this Court herein

from enforcing or attempting to enforce the provisions of said statute, and particularly restraining them from denying to appellant and other newspaper publishers the privileges of the mail by reason of the failure or neglect of appellant and such other publishers to comply with the provisions of said law and file the statements required thereby.

Dated, New York, March 10th, 1913.

ROBERT C. MORRIS,
Of Counsel for Appellant.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 819.

LEWIS PUBLISHING COMPANY, APPELLANT,

vs.
EDWARD M. MORGAN, AS POSTMASTER OF THE UNITED
STATES OF AMERICA IN AND FOR NEW YORK CITY,
BOROUGH OF MANHATTAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1912.

(23,394)

(23,394)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 819.

LEWIS PUBLISHING COMPANY, APPELLANT,

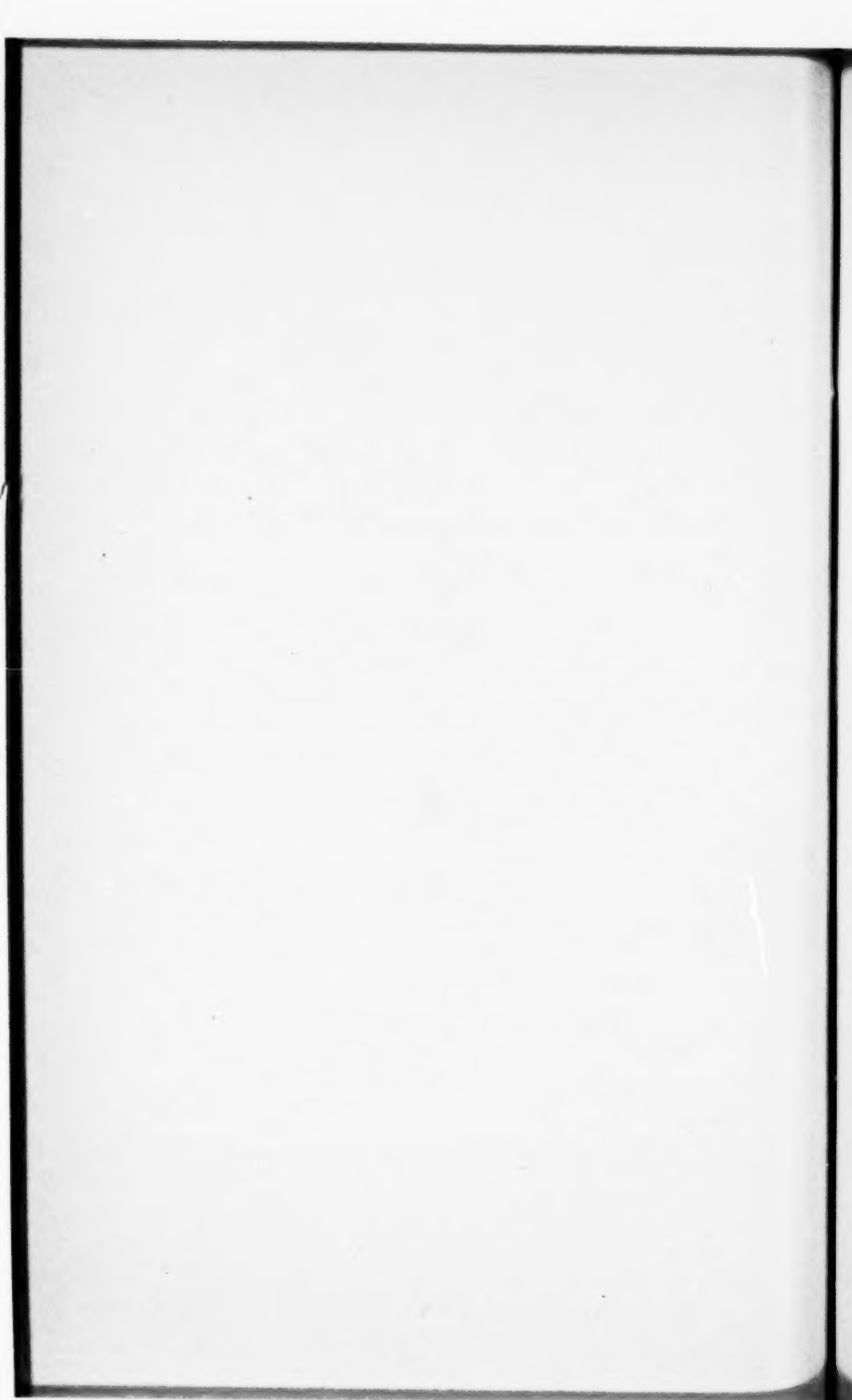
vs.

EDWARD M. MORGAN, AS POSTMASTER OF THE UNITED STATES OF AMERICA IN AND FOR NEW YORK CITY, BOROUGH OF MANHATTAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Subpœna.

The President of the United States of America to Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Greeting:

You are hereby commanded that you personally appear before the Judge of the District Court of the United States of America for the Southern District of New York, in the Second Circuit in Equity, on the first Monday of December A. D. 1912 wheresoever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court, by The Lewis Publishing Company and to do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 17th day of October in the year one thousand nine hundred and twelve and of the Independence of the United States of America the one hundred and thirty seventh.

ALEX. GILCHRIST, JR., *Clerk.*

JAMES M. BECK,

Complainant's Sol's.

The defendant is required to enter appearance in the above cause in the Clerk's office of this Court, on or before the first Monday of December 1912 or the bill will be taken pro confesso against him.

ALEX. GILCHRIST, JR., *Clerk.*

(Endorsed:) U. S. District Court, S. D. N. Y. Filed Oct. 17, 1912.

[Endorsed:] Eq. 375. Rec'd Oct. 17, '12. To be returned to U. S. Dist. Att'y. Service of the within subpoena is hereby admitted. New York, Oct. 17, 12. Edward M. Morgan, by Henry A. Wise, U. S. Attorney.

Bill of Complaint.

District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Lewis Publishing Company, a lawful corporation, organized and existing under and by virtue of the laws of the State of New

York, brings this its bill of complaint against Edward M. Morgan, the duly appointed and duly acting Postmaster for the United States in the City of New York, and thereupon your orator alleges and complains:

I.

That your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and is a citizen of said State and maintains its principal office and place of business at No. 826 Eighth Avenue, in the City of New York and in the Southern District of New York, and that as such corporation it is and has been for a long time engaged in the lawful business of publishing, printing, selling and distributing a certain daily newspaper called the Morning Telegraph. That the capital stock of the complainant is \$10,000 and all its capital stock is invested in the said newspaper property and it thereby owns a business in which it has valuable property rights and from which it derives great gains and profits.

II.

That the defendant herein, Edward M. Morgan, was at the time of the filing of the bill and has been for a long time and at all the times hereinafter stated, the duly appointed Postmaster of the United States in charge of the United States Post Office in the City of New York, Borough of Manhattan, State of New York, and the said Edward M. Morgan is a resident and citizen of that State. That as such Postmaster he has the exclusive management of the Post Office in the City of New York and of the receipt and distribution of mail received at that City through the United States mails, subject to the laws of the United States duly enacted.

III.

That your orator, in the publication and circulation of said newspaper has for a long time sent and is sending through the mails copies of the said newspaper to its readers and subscribers and, pursuant to the postal laws of the United States, your orator has had said newspaper entered in the said Post Office in the charge of the Defendant in the Borough of Manhattan, City of New York, as second class mail matter. That without such use of the mails it would be impossible for your orator to conduct its business without substantial loss and impairment, if not complete destruction, of its property rights, including the good will of the corporation. It depends upon the mails of the United States, not merely to circulate its newspapers but also to receive from its subscribers the sums of money paid either for advertising or for copies of the paper and also for reading matter, which is contributed to its columns. If your orator were denied the use of the mails, the result would be that it would be impossible, without great expense, for your orator to collect subscriptions or sums of money for advertising, to send bills for either, to receive reading matter from its contributors, to distribute its copies and otherwise enjoy that freedom of the press which

the First Amendment to the Constitution guarantees. Exclusion from the mails would therefore mean a substantial impairment if not a complete destruction of your orator's valuable business, and unless your orator were lawfully excluded from the mails, it would be denied the facility of postal distribution, which all other owners of newspapers and all other citizens engaged in business occupations freely enjoy. That under the laws of the United States duly enacted this complainant had the right to such free and unrestricted use of the mails upon the same terms and conditions as provided for all other citizens.

IV.

That on the 24th day of August, 1912, the Congress of the United States, with the approval of the President, attempted to pass a law, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, 1913, and for other purposes" (a part of which, viz., section 2 is hereto appended and marked Exhibit "A" and made part hereof) which section, as hereinafter stated and hereinafter referred to as "the law," was in excess of the powers delegated to such Congress by the Constitution of the United States. It provided in substance that it
5 was the duty of your orator and every other owner of a newspaper or periodical to file "not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement," giving certain information as to the details of your orator's business, as in said pretended law is more particularly set forth, and it was further provided that after said sworn statement was made to the Postmaster in the post office in which said publication was entered, the owner of such newspaper should thereupon publish in the second issue of such newspaper, after the filing semi-annually of such statements a true and correct copy of each; and it was further provided that if such unlawful and invalid requirements were not complied with "within ten days after notice" by registered letter of such failure, such *such* publication should thenceforth be "denied the privileges of the mail".

V.

Under and by virtue of the mandatory provisions of said invalid law, the Postmaster of New York, defendant herein, did serve your orator with the blanks upon which your orator was commanded to give the information as to its ownership and circulation (a copy of which notice is hereto appended, marked Exhibit "B" and made part hereof), and under and by virtue of said provision, the said Postmaster is further required, not as matter of discretion but as an absolute duty, if the law be a valid one to give your orator ten days' notice to comply with said law, and upon failure to comply, to exclude your orator's publication, the said Morning Telegraph, from "the privileges of the mail."

Your orator, believing that said law is, for reasons hereinafter stated, in violation of the Constitution of the United States and therefore null and void, has refused to execute or file said blanks or to publish same in its newspaper as required by said law and the

6 defendant is about to serve upon your orator in accordance with the mandatory provisions of said law an exclusion notice, with the purpose of denying to your orator the privileges of the mail for any purpose.

Your orator therefore has reason to fear, unless he complies with the alleged law in question, a summary denial of the privileges of the mail, which as hereinbefore stated would inflict irreparable loss and damage upon your orator and its business, and result in a virtual confiscation of its business.

VI.

Your orator avers and humbly submits to your honorable Court that the said pretended law is null and void, in that it has been enacted in excess of the powers delegated to the Federal Government and in violation of the rights reserved to the several States or the people thereof under the Tenth Amendment to the Constitution.

Your orator avers that the said pretended Act of Congress was not enacted as an incident to or in exercise of any right delegated to the Federal Government, but is an attempt to regulate journalism by constituting an inquisition into the business details of the newspaper periodical corporations of the United States and into the circulation of the newspapers, not authorized by the Constitution of the United States.

VII.

Your orator further suggests that such an inquisitorial examination into the business details of your orator and the circulation of its publication and the threatened denial of the privileges of the mail would be an abridgement of the freedom of the press and therefore in violation of the First Amendment to the Constitution.

VIII.

7 Your orator further avers and humbly submits that the mandatory provision that your orator shall insert twice a year in its publication a copy of said sworn statement is an attempted appropriation by the Government of space in your orator's publication, which is valuable, and is furthermore an appropriation of the capital, labor and property of your orator, which would thus be used without its consent and against its protest by the Government for the purpose of accomplishing a purpose which is not within the scope of powers delegated under the Constitution of the United States to the Federal Government and that for these reasons such enforced appropriation of a portion of your orator's publication and such enforced utilization of its machinery, capital and labor facilities is a taking of property without due process of law, in violation of the Fifth Amendment to the Constitution in that it deprives your orator of its property "without due process of law" and also takes your orator's private property for public use without just compensation.

IX.

Your orator further avers and humbly submits that the power delegated by the Constitution of the Federal Government "to es-

established post offices and post roads" is a power designed to create and operate the ordinary facilities of circulation by governmental mails, without discrimination and with equal privileges to all, and that the power thus granted is limited to the creation of post roads and post offices and the physical transportation of the mails, but that it does not include as a reasonable or necessary incident a right to regulate the business of those who thus utilize the facilities of the mails and that the attempt by the present alleged law to regulate the business of journalism by compelling the owners of newspapers to conform to the inquisitorial methods provided in said Act, and to disclose the details of their business to their competitors and the public generally, under penalty, if they fail to do so, of exclusion from the mails, is a perversion of the federal power over post

8 offices and post roads, for which the Constitution of the United States has no warrant and which is in violation of the Tenth Amendment to the Constitution, reserving to the States or the people thereof all rights not expressly or by fair implication delegated to the Federal Government.

Your orator therefore avers and humbly submits that as the Constitution did not attempt to delegate the power to the Federal Government to regulate journalism, this denied power thus reserved to the States or the people thereof cannot be indirectly exercised by penalizing publishers through the exclusion of their publications from the mails and thus attempting by the duress of threatened injury to compel the acquiescence in the exercise of unconstitutional powers.

X.

Your orator further avers and humbly submits that as all other business and gainful occupations of the United States, which are not contrary to morality or health, are allowed to use the mails without discrimination and without an inquisitorial examination into the facts of their ownership or the extent of their business, an attempt to deny to the owners of newspapers the same equal and unrestricted facilities in the matter of the mails would be a virtual and substantial denial to the owners of newspapers, including your orator, of the equal protection of the law, thus depriving your orator of its liberty of contract and property without due process of law.

XI.

That under further provisions of the said law it is also provided that all editorial and other reading matter published in such a newspaper as that published by your orator, for the publication of which money or other valuable consideration is paid, accepted or promised,

9 when so published shall be plainly marked "Advertisement," and it is further provided that any failure thus to mark such reading matter as an advertisement, shall subject the editor or publisher of the paper to a criminal prosecution, and in the event of a conviction, to a penalty of not less than \$50 nor more than \$250.

Your orator has been in the habit for some years and is now publishing in certain of its issues certain classes of reading matter, not of general interest to all its readers but of special interest to some of

its readers, which insertion is for the interest of those contributing thereto and for which the said contributors pay to your orator a reasonable sum for the privilege of inserting such reading matter and the cost of such publication.

Your orator avers and humbly submits that as the publication in question is published with its capital and by its labor and is its private business, it has the right to sell its space upon such terms and conditions as to it shall seem proper and as may be agreed upon by mutual agreement between your orator and its contributors.

Your orator avers that the said pretended law, regulating the methods of advertising, seeks to make such reading matter unlawful and unmailable and that while the law in question does not specifically provide for the exclusion of such matter from the mails, yet as it cannot be separated from the rest of the newspaper, it would be the duty of the Postmaster, if the said law were valid, to exclude from the mails any publication, including that of your orator, in which reading matter thus paid for was published without being specifically marked as an advertisement.

Your orator avers and humbly submits that this section of the law is null and void and in violation of the Constitution of the United States, for all the reasons herein specifically stated with reference to the other provisions of the law and to which reference is craved without unnecessary repetition.

Your orator avers that in addition to the other constitutional guarantees, which the said pretended Act of Congress seeks
10 to violate, this last referred to provision further violates the liberty of contract which is further guaranteed to your orator and its contributors by the Constitution of the United States.

XII.

By reason of the premises, your orator submits that if the Postmaster of New York, defendant herein, be permitted to enforce the said unconstitutional law, great and irreparable damage will be inflicted upon your orator in violation of his constitutional rights and that to prevent said unlawful injury, it is to the interest of the United States and the people thereof and to your orator's interest, that such unlawful injury shall be prevented and your orator is advised by counsel that to accomplish this result there is and can be no adequate remedy at law, and that the only remedy open to your orator to prevent such irreparable injury is for your honorable Court, as a court of equity, to exercise its great remedial power of a writ of injunction to the end that the officer of the United States, the defendant herein, shall not in violation of the Constitution of the United States and in violation of your orator's property and personal rights, attempt to carry out said null and void law.

To the end therefore that your orator may have the relief which it can only obtain in a court of equity and that the defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, your orator prays:

1. That it be adjudged and decreed that all the sections and pro-

visions of the said pretended Act of Congress are illegal and void and in violation of the Constitution of the United States and that the defendant herein, either as an individual or as Postmaster for the

United States in the City of New York, Borough of Manhattan, has no right to act thereunder either against your orator or against any other citizen.

2. That as no complete relief could be granted by your honorable Court without the preservation of the status quo and as the temporary enforcement of the law would inflict irreparable loss upon your orator, even though the final decree of your honorable Court were in favor of your orator, therefore your honorable Court shall issue against the defendant herein named a temporary injunction restraining him and any and all persons acting through or under him and any and every person acting under and by virtue of the authority of said invalid law, from in any way enforcing or attempting to enforce the said law (set forth in Exhibit "A") or any of the provisions thereof against your orator, and that a restraining order may be granted against the defendant and any and all persons acting through him and them likewise from proceeding under said alleged law until your honorable Court shall determine on motion and hearing whether a temporary injunction with like effect shall not be granted pendente lite.

3. Your orator further asks such further relief as to your honor shall seem meet and shall hereafter seem necessary.

[SEAL.]

THE LEWIS PUBLISHING COMPANY,
By JOHN H. DELANEY, *Secretary*.

JAMES M. BECK,
Counsel for Complainant.

Oct. 17, 1912.

12 UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 17th day of October, 1912, before me personally appeared John H. Delaney, to me known and known to me to be the Secretary of the above named Lewis Publishing Company, a New York corporation, who made oath that he is the Secretary of such corporation; that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

JOHN H. DELANEY. [SEAL.]

Sworn to before me October 17, 1912.

MORRIS PALLINGER, [SEAL.]
Notary Public, New York County, No. 102.

13

EXHIBIT "A."

"(Public No. 336.)

"(H. R. 21279.).

"An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * *

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and *and* the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided Further, That it shall not be necessary to include

in such statement the names of persons owning less than one 14 per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

EXHIBIT "B."

[Duplicate.]

POST OFFICE, NEW YORK, N. Y.,
OFFICE OF THE POSTMASTER,
SEPTEMBER 20, 1912.

2 Encls.

Publisher "The Morning Telegraph," 826 Eighth Avenue, New York, N. Y.

DEAR SIR: Your attention is invited to the following provisions of the Postal Laws and Regulations:

SEC. 467 1/2. It shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation, and also the names of known bondholders, mortgagees, or other security holders; and also in the case of daily newspapers, there shall be included in such statement the average of the numbers of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure. (Act of Aug. 24, 1912.)

2. All editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500). (Act of Aug. 24, 1912.)

3. The statement required by this section shall be made in duplicate, on Form 3526, and both copies delivered to the postmaster at the office of entry of the publication. The postmaster will forward one copy to the Third Assistant Postmaster General (Division of

Classification) and retain the other in the files of the post office

16 To enable publishers to file such statement promptly, postmasters will furnish them copies of Form 3526 at least ten days prior to the first days of April and October of each year.

4. Postmasters will obtain for the files of their offices two copies of the issue of each publication at their respective offices in which the required sworn statement is published.

Two copies of Form 3526 are enclosed herewith for the sworn statement regarding your publication required under this law. Please note that the statement must be executed in duplicate and see that each is properly sworn to and that the two copies are sent to Room 4, General Post Office, *on or before October 1, 1912.*

Your attention is also invited to the requirement of the law that the sworn statement referred to above must be published in the second issue of your publication printed next after the filing of such statement and that two copies of the issue in which the sworn statement is published must be furnished. These copies should be sent to Room 4, General Post Office.

Very respectfully,

EDWARD M. MORGAN, *Postmaster.*

Statement of the Ownership, Management, Circulation, Etc.

of published

(Insert title of publication.)

(State frequency of issue.)

at....., required by the Ac

(Name of post office.)

of August 24, 1912.

NOTE.—This statement is to be made in duplicate, both copies to be delivered by the publisher to the postmaster, who will send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the post office.

17 Name of—

Post-office Address.

Editor.....

Managing Editor.....

Business Managers.....

Publisher.....

Owners: (If a corporation, give names and addresses of stock holders holding 1 per cent or more of total amount of stock.)

.....

.....

.....

.....

.....

.....

.....

.....

Known bondholders, mortgagees, and other security holders, holding 1 per cent. or more of total amount of bonds, mortgages, or other securities:

.....

(If additional space is needed, a sheet of paper may be attached to this form.)

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date of this statement. (This information is required from daily newspapers only.)

.....
 (Signature of editor, publisher, business manager or owner.)

Sworn to and subscribed before me this — day of —, 191—. [SEAL.] — —, — —.

(My commission expires — —, 191—.)

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

18 *Notice of Appearance.*

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
 Complainant,
 vs.

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

To the clerk of said court:

Please enter my appearance as solicitor for the defendant Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, in the above-entitled case.

Dated, New York, October 17, 1912.

HENRY A. WISE,
*United States Attorney for the
 Southern District of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 17, 1912.

Demurrer.

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,

vs.

EDWARD M. MORGAN, as Postmaster of the United States in and for
the City of New York, Borough of Manhattan, Defendant.

The Demurrer of Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant, to the Bill of Complaint of the Lewis Publishing Company, a Body Corporate in Law, Complainant.

The above-named defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

(1) That the said complainant has not in and by said bill of complaint made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant;

(2) That the said complainant has not in and by said bill of complaint exhibited such a cause as entitles it in a court of equity to any relief against this defendant, as to the matters contained in the said petition, or any of such matters.

20 Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant does demur to the said bill of complaint and to all matters and things therein contained, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill of complaint or any of the matters or things therein contained, and does further pray to be hence dismissed with his reasonable costs and charges in this behalf sustained.

Dated, New York, October 17, 1912.

HENRY A. WISE,
*United States Attorney for the Southern District
of New York, Solicitor for Defendant.*

21 STATE OF NEW YORK,
County of New York, ss:

Henry A. Wise, being duly sworn, says, that he is the solicitor herein for Edward M. Morgan, Postmaster of the United States in and for the City of New York, the defendant herein; that he is familiar with the facts herein; that said Edward M. Morgan is absent from the City of New York, and accordingly cannot verify this affidavit, and for that reason deponent makes this affidavit, and declares that the foregoing demurrer is not interposed for the purpose of delay.

HENRY A. WISE,
Solicitor for Defendant.

Subscribed and sworn to before me this 17th day of October, 1912.

(Signed) FREDERICK L. CAMPBELL,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY A. WISE,
Solicitor for Defendant.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

22 *Decree Sustaining Demurrer and Dismissing Bill of Complaint.*

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,

vs.

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

This cause came on to be heard at the October Term of this Court, 1912, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed, that the demurrer to the bill of complaint herein be and the same hereby is sustained, upon the ground that the said complainant has not, in and by the said bill of complaint, made or stated any such cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against the defendant, and that the said bill

of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk of this Court.

Dated, this 17th day of October, 1912.

(Signed)

LEARNED HAND,
*Judge of the United States District Court
for the Southern District of New York.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

23 District Court of the United States for the Southern District
of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against

EDWARD M. MORGAN, as Postmaster of the United States in and
for the City of New York, Borough of Manhattan, Defendant.

Petition for Appeal.

The above named plaintiff, believing that the final decree, entered on the 17th day of October, 1912, in the above entitled proceeding in favor of the defendant and against this complainant, is in contravention of the Constitution of the United States and in violation of the rights secured to the plaintiff under the Constitution of the United States (as appears more particularly in the assignment of errors herewith filed) doth hereby appeal from the said decree to the Supreme Court of the United States, and having filed with the Clerk of this Court its assignment of errors, the complainant prays
this court to allow an appeal to the Supreme Court of the
24 United States from the said decree and that a certified transcript of the record upon which the said decree was made be transmitted to said Court.

Dated, New York, October 17, 1912.

JAMES M. BECK,
Solicitor for Complainant.

Allowed this 17th day of October, 1912. •

LEARNED HAND,
District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

25 District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against

EDWARD M. MORGAN, as Postmaster of the United States in and for
the City of New York, Borough of Manhattan, Defendant.

Assignment of Errors by the Complainant in the Above-entitled Case.

And now on the 17th day of October, 1912, comes the complainant in the above entitled case and says that in the record and proceedings in the above entitled case and in the final decree entered therein, there is manifest error in each and every one of the following particulars, to wit:

1. Because the Court, in sustaining the demurrer to the bill of complaint has held that the said bill of complaint did not constitute a cause of action.

2. Because the Court sustained the demurrer to the sufficiency of the said bill of complaint and dismissed the bill.

3. Because the Court failed to decree the relief prayed for
26 in said bill, the facts alleged in said bill of complaint having been admitted by the demurrer.

4. Because the Court adjudged by said decree that section 2 of the Act of Congress approved the 24th day of August, 1912, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1913, and for other purposes," which section is fully recited in Exhibit "A" to complainant's bill of complaint, was not in violation of the First Amendment to the Constitution of the United States.

5. Because the Court adjudged by said decree that said section 2 of said Act was not in violation of the Fifth Amendment to the Constitution of the United States.

6. Because the Court adjudged by said decree that said section 2 of said Act was not in violation of the Tenth Amendment to the Constitution of the United States.

7. Because the District Court erred in adjudging by said decree that so much of section 2 of said Act as requires the complainant, as the owner and publisher of a daily newspaper, to disclose to the Post Office Department of the United States the details of its ownership and the extent of its circulation was not in violation of the First, Fifth and Tenth Amendments to the Constitution of the United States.

27 8. Because the District Court erred in adjudging by said decree that so much of section 2 of said Act as attempted to compel the complainant to publish in its newspaper, the Morning Telegraph, a copy of the statement required by said law as to its ownership and the extent of its circulation was not in violation of the Fifth and Tenth Amendments to the Constitution of the United States.

9. Because the Court failed to adjudge and decree that the said section 2 of the said Act was as an entirety and in all its parts in violation of the First, Fifth and Tenth Amendments to the Constitution of the United States, in that its enforcement would in the case of the complainant abridge the freedom of the press, would take its property without due process of law and for public use, without just compensation, would involve an unreasonable search and seizure and would deprive it of property rights and of the right to liberty of contract reserved to it under the Tenth Amendment to the Constitution.

Wherefore the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such
28 disposition may be made thereof as in accordance with law and the Statute of the United States in such case made and provided.

JAMES M. BECK,
Solicitor for Complainant.

Dated, New York, October 17, 1912.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 17, 1912.

29 District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

On motion of James M. Beck, Solicitor for complainant, it is Ordered, that the appeal to the Supreme Court of the United States from the final decree, filed and entered herein on the 17th day of October, 1912, be, and the same hereby is, allowed; and that a certified transcript of the record and all the proceedings herein be forthwith transmitted to the said United States Supreme Court, at Washington, D. C.

And it is, further,

Ordered, that the bond on appeal herein be fixed at the sum of \$250, the same to act as a supersedeas bond and also as a bond in costs and damages on appeal.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

Dated, October 17, 1912.

- 30 The filing of the within bond is hereby waived.
New York, Oct. 17, 1912.

HENRY A. WISE,
*U. S. Attorney,
Solicitor for Defendant.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

- 31 THE UNITED STATES OF AMERICA, *ss:*

To Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, within thirty days from the date of this appeal duly allowed by the District Court for the Southern District of New York on the 17th day of October, 1912, and filed in the Clerk's office of said Court on the 17th day of October, 1912, in a cause wherein the Lewis Publishing Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be granted and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 17th day of October, A. D. 1912.

LEARNED HAND,
*United States District Judge for the
Southern District of New York.*

- 32 [Endorsed:] E. 89/375. E. 9. 375. U. S. District Court, Southern District of New York. The Lewis Publishing Company, etc., against Edward M. Morgan, as Postmaster, etc. 10. Citation on Appeal. U. S. District Court, Oct. 17, 1912. — M. S. D. of N. W.

- 33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant-Appellant,

vs.

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court be hereunto affixed, at the City of New York, in the Southern District of New York, this Seventeenth day of October, in the year our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seven

[Seal District Court of the United States, Southern
District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

34 [Endorsed:] United States Supreme Court. The Lewis Publishing Company, a body corporate in law, Complainant-Appellant, vs. Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant-Appellee. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 23,394. S. New York, D. C. U. Term No. 819. Lewis Publishing Company, appellant, vs. Edward M. Morgan, as postmaster of the United States of America in and for New York city, borough of Manhattan. Filed October 18, 1912. File No. 23,394.

No. 819.

NEW YORK DIST. C. T.
FILED

OCT 19 1912

JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1912.

NO.

THE LEWIS PUBLISHING COMPANY,

a body corporate in law,

Complainant Appellant,
against

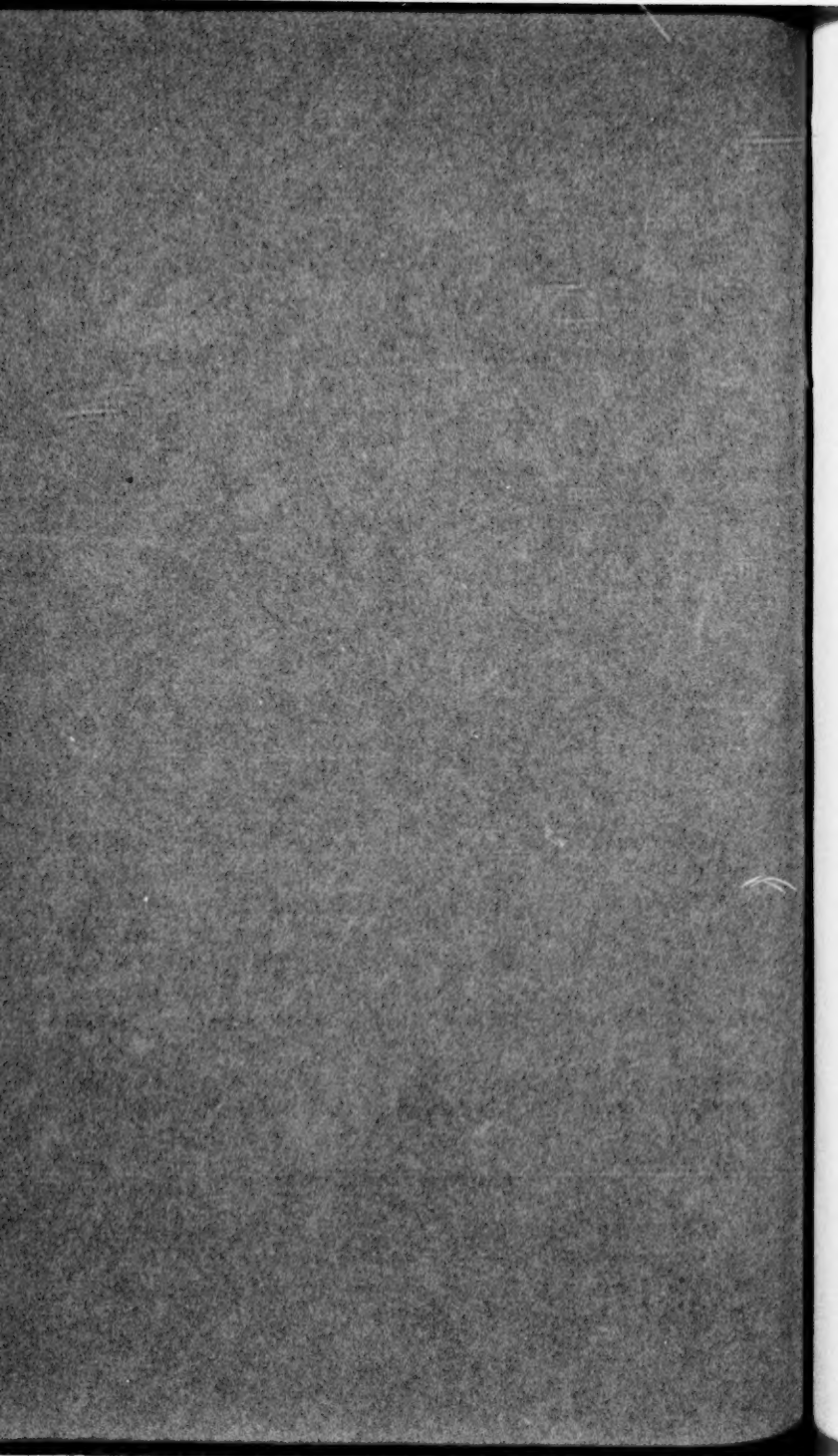
EDWARD M. MORGAN, Postmaster in and for the
City of New York,

Defendant Appellee.

MOTION TO ADVANCE.

JAMES M. BECK,

Counsel for Lewis Publishing Company, Appellant.



No.

Supreme Court of the United States,

OCTOBER TERM, 1912.

THE LEWIS PUBLISHING COMPANY, a
body corporate in law,
Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Postmaster in
and for the City of New York,
Defendant-Appellee.

Now comes the said appellant by James M. Beck his attorney and moves this honorable Court to advance this cause upon the docket and set it down for hearing upon a day certain and to hear it as soon as the convenience of the Court will permit and for the reasons therefor he states. The appellant asks that the case be advanced so that it can be heard concurrently with the case of *Journal of Commerce vs. Hitchcock et al.* (October Term, 1912, No.), which involves substantially the same question and as to which a similar motion to advance is now pending.

Statement of Facts.

This action is brought by the Lewis Publishing Company, the owner and publisher of a daily newspaper in the City of New York, called the Morning Telegraph, against Edward M. Morgan, Postmaster of the United States for the City of New

York, and seeks to enjoin the said Postmaster from denying to the complainant the privileges of the mail for not complying with the provisions of section 2 of an Act approved August 24, 1912, entitled, "An Act making appropriations for the service of the Post Office Department", etc. This section, *the constitutionality of which is in dispute*, is quoted in full as an appendix to this motion (see Exhibit "A").

The law in question is a novel departure in Post Office legislation and, as we shall contend, in effect attempts to regulate the business of journalism, while pretending to regulate the transportation of the mails. It provides for an inquisitorial examination into the ownership of newspapers (including mortgage creditors thereof), and the extent of their circulation, and it further attempts to compel the newspaper to publish semi-annually at its own expense these details of their business, not apparently for the benefit of the Post Office Department, but for the assumed benefit of the public.

It further regulates the methods of journalism by providing that if the editor or publisher shall accept any compensation for any editorial or other reading matter and publishes such matter without plainly marking it as an advertisement, such editor or publisher shall be prosecuted criminally and upon conviction fined.

The Legislation in question is therefore novel and drastic. It denies the editors and publishers of the country, of whom there are many thousands, the privilege of utilizing their capital, property, plant and labor facilities to their own advantage, and it compels every newspaper to disclose the extent of its circulation notwithstanding that such disclosures would necessarily put the newspaper of small circulation at a serious disadvantage in obtaining advertising as against the newspaper of large circulation.

On this motion to advance it is not necessary to amplify the serious inconvenience and unnecessary injury which this legislation would cause to the publishers of newspapers and periodicals in this country.

As no attempt has hitherto been made by the Federal Government to regulate journalism (except in so far as the transmission through the mails of immoral literature is concerned), *it is obvious that this Court has never passed upon the validity of such legislation under the Constitution of the United States.*

Counsel for the complainant and other counsel, who have carefully considered the question, are clearly convinced that this legislation violates the First, Fifth and Tenth Amendments to the Constitution of the United States in that it is—

(a) A substantial abridgement of the freedom of the press.

(b) It deprives the owners of newspapers of their property without due process of law and attempts to appropriate their property for an assumed public use without compensation.

(c) It seeks to exercise a supervisory power over the methods of journalism not germane to the due regulation of postal facilities, which power the Constitution of the United States has neither in express terms nor by reasonable implication granted to the Federal Government.

Underlying these grave constitutional questions, which even a cursory reading of the proposed law suggests, *there is an underlying constitutional question of grave import and far reaching consequences. How far can Congress, under the pretext of exercising an unquestioned federal power, such as the power "to establish post offices and post roads," so use that power as to accomplish objects not within the scope of the Federal Government?*

This Court disclaimed, in the Lottery Case (188 U. S. 321) any power of the Federal Government to exercise "arbitrarily" even the plenary power over interstate commerce. Can therefore the Federal Government deny the equal privilege of the mails to any citizen, unless he will comply with demands which the Federal Government otherwise could not make?

No attempt will be made in this motion to argue the merits of these grave questions. The Attorney General of the United States has recognized the importance of the case, and I am authorized by the Solicitor General to state on behalf of the United States, that he "concurs in the application to advance the case".

These questions should be given an early hearing and a speedy decision, both in the interests of the Government and in the interests of many thousand publishers of newspapers and periodicals. The officials of the Government, on the one hand, should be promptly advised whether they are under obligation to enforce this novel and drastic Statute. If no decision be speedily reached, many

publishers will acquiesce, as some have already done, in the requirements of this unconstitutional law, rather than litigate the matter with the Government, and thus the officials of the Government, on the one hand, will unwittingly inflict, and the publishers on the other hand will involuntarily suffer, irreparable loss and damage. If the law be unconstitutional, this irreparable harm to a legitimate industry should be promptly ended.

The case is therefore of general and urgent importance and I earnestly submit that your honorable Court should grant this motion.

New York, October 17, 1912.

JAMES M. BECK,
Counsel for Appellant.

Exhibit "A."

" (Public No. 336)

" (H. R. 21279).

" An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * *

" SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided, Further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the pro-

visions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

WILLIAM P. BURTON, U. S.
JUDGE.

NOV 30 1912

JAMES H. MCKENNEY,

CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 819.

THE LEWIS PUBLISHING COMPANY,
a body corporate in law,
Complainant-Appellant,
against

EDWARD M. MORGAN, Postmaster in and for the
City of New York,
Defendant-Appellee.

THE INVALIDITY OF A FEDERAL CENSORSHIP OF THE PRESS.

BRIEF FOR APPELLANT.

JAMES M. BECK,
Counsel for Appellant.



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Supreme Court of the United States.

THE LEWIS PUBLISHING COM-
PANY, a body corporate in
law,

Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Post-
master in and for the City of
New York,

Defendant-Appellee.

BRIEF FOR THE APPELLANT.

Statement of Facts.

The newspaper law,* whose constitutionality is in this suit called into question, is neither in form nor substance a law to regulate the carriage of the mails but *to regulate journalism*.

In this respect it has the merit of sincerity. It does not pretend to be in aid of the Post Office De-

* Reprinted in full as an appendix. (*Post*, p. 51.)

partment. That Department did not seek its enactment but protested against it.*

The law in question makes no reference to the mails except that it uses exclusion therefrom *as a means of enforcing this censorship of the press.*

Even this remote connection is wanting in the latter section of the law, which requires paid reading matter to be formally branded as an advertisement. Its enforcement is left to a criminal action for a penalty.

* When the bill was under consideration before the Senate Committee on Post Offices and Post Roads, the Postmaster General addressed a formal letter to Senator Bourne, the Chairman of the Committee, in which, after discussing other details of the general appropriation bill, he made this specific protest against the passage of the newspaper section :

" I also call your attention to that portion of the bill beginning on Page 33, Line 19, which requires the insertion in newspapers and periodicals of the name of the owner or owners and the managing editor or managing editors, and also that matter for the insertion of which a charge is made by the publishers should be marked as an advertisement or private name of the writer signed thereto. *In my judgment this provision is not only needless, but will be positively harmful, as it will require the continuous use of valuable space in the publication and at the same time be resented as a censorship of the press.*

One of the greatest difficulties now encountered in the enforcement of the laws relating to second-class mail privileges is the fact that the Post Office Department is under its duty compelled to make inquiry into many aspects of the private business of publishers. This gives rise to the complaint, though ill-founded, that the Government carries on a needless interference with the privileges of the press. The *only possible service* to be rendered by such a provision would be the identification of the owners and writers of newspapers and periodicals in order to hold them for contractual obligations or for libelous printed matter, both of which would be matter under the jurisdiction of the State and not the Federal authorities.

I am of the opinion that it should be the constant aim, not only of Congress, but of the Post Office Department as well, to lessen the necessity for supervision of the public press in order to administer the postal laws and regulations. I earnestly hope that the provision referred to will not become law."

The law has two plainly avowed objects.

The first is to compel a disclosure to the Government, under oath, of the names and addresses of the editors, publishers, business managers and owners, stockholders, security creditors and the daily circulation of such newspapers for the preceding six months.

This will be hereafter referred to as the inquisitorial provision.

The second object is to compel a disclosure to the public through newspaper publication of these facts and also whether any editorial or reading matter in such publication has been inserted for a valuable consideration.

This will be hereafter referred to as the publicity provision.

The publicity provision cannot be referred to any proper function of the Post Office Department. Its function is to carry the mails and in such carriage it cannot matter whether *the public* are advised as to the ownership, editorial direction and circulation of a newspaper or not, or whether the matter which it publishes is published for a consideration.

The requirement that the publishers shall file a sworn statement on these matters with the Post Office Department was not intended as a means of determining whether a newspaper was in fact entitled to the privileges of second-class rates, for as the Attorney General, in the opinion which he has given to the Postmaster General with reference to this law, plainly points out, the Post Office Department already

has all of the inquisitorial power that it needs for this purpose.*

The history of the legislation also makes it clear that the purpose of the Act was not to enable the Post Office Department to carry on its work but to regulate journalism for the supposed benefit of the public.

While resort may not be had to the debates in Congress to determine the *interpretation* of a statute, yet

* The Attorney General says :

"Independently of this amending act, in order that the Postmaster General may determine whether or not a publication applying to be admitted to the second class has a legitimate list of subscribers, and is not designed primarily for advertising purposes, or free circulation, or for circulation at nominal rates, the Postmaster General is entitled to require full and complete statements showing the character of the business of the publication, and by section 436 of Regulations (Edition of 1902) he has required Postmasters to secure satisfactory evidence that publications so offered for entry have 'a legitimate list of subscribers approximating 50% of the numbers of copies regularly issued and circulated, by mail or otherwise, made up, not of persons whose names are furnished by advertisers or by others interested in the circulation of the publication, but of those who voluntarily seek it and pay for it with their own money, although this rule is not intended to interfere with any genuine case where one person subscribes for a definite period of several issues for a limited number of copies for another.'

And by section 438 the Postmasters are directed to require the proprietor or duly authorized representative, on applying for second-class mail privilege, to furnish detail information of a character deemed requisite by the Postmaster General to enable him to determine whether or not the publication falls within the requirements of the acts of Congress. The right of the Postmaster General to exact this information is in no respect impaired or affected by the provisions of the Statute under consideration.

Those provisions are inserted as a part of the Act of 1912, which is apparently designed to insure publicity as to the ownership and control of a publication. This particular clause was inserted by amendment just before the passage of the Act, and bears no ascertainable relation to the subject matter of the paragraph in which it was inserted."

they can be examined when the *object* of a statute is a pertinent matter.* The proponents in Congress of this novel law, very frankly admitted that the purpose of the act was to regulate journalism, rather than the mails. The debates may be searched in vain for any suggestion that the efficient carriage of the mails was the object of the legislation.*

The face of the statute shows its true purpose.

* Senator Bourne, Chairman of the Committee on Post Roads, said :

" I assume the desire is to furnish the public information as to the possible bias of the paper incident to ownership or incident to obligations of the paper or its owners to individuals."

Another advocate of the legislation, Senator Reed of Missouri, said that

" the purpose of the proposed law was that the people who read the newspapers should be advised of the control back of the news papers."

When the proposed legislation was originally suggested in the House of Representatives, Congressman Henry of Texas, Chairman of the Committee on Rules, stated that its purpose was

" that the American people may see the men who stand behind the guns trained against public officials."

When the addition with reference to the printing of paid matter was added, its proponent, Congressman Barnhardt of New York, stated as its purpose that this provision

" will not cost the people anything but will conserve honesty and public confidence in one of the greatest educational factors in the world."

Congressman Victor Berger, of Wisconsin, said :

" It seems to me that the politicians are trying to get even with the newspapers, which are continually prying into the private affairs of the politicians. The politicians want to know everybody connected with the papers and thus get the best of them. You can never do it, gentlemen, because in the end the newspapers will have the last word every time, no matter what you do. If you get the ill will of your own party papers, you might just as well quit the political game. Moreover, there is a grave danger lurking behind the proposition. The freedom of the press is involved."

* See *U. S. v. Press Co.*, 219 U. S., 1.

Religious, fraternal, temperance, scientific or other similar publications, are exempted from its provisions, and the requirement as to disclosure of circulation is further limited to daily newspapers.

If it be desirable that the Postmaster General before admitting a periodical to second class rates or to the privileges of the mail at all, shall require a statement of its average circulation, such requirement, so far as the Post Office Department is concerned, must be quite as important in the case of a religious or scientific journal as an ordinary newspaper, and certainly there can be no reasonable distinction as to such publicity between a weekly and daily newspaper. This discrimination shows that the law attempts to regulate the instrumentalities of public opinion, the newspaper press, and that the carriage of the mails or the right to second class matter was not the object of Congress. It attempts to ascertain who are responsible for daily newspapers, and the extent of their influence as measured by circulation.

Congress sought to censor the press by compelling disclosure and publicity of facts vital to its influence under the penalty of exclusion from the mails, a penalty sufficiently drastic, for such exclusion would wreck any publication. The penalty is not merely exclusion from the privilege of *second-class* rates or a denial of the carriage of the newspaper through the mails. The owners and publishers, who refuse to comply with the law, are denied the privilege of the mails for any purpose. As to paid matter, they are subject to indictment and a fine.

With the policy of this law, this Court has no concern. It can only inquire whether it is a valid law under the Constitution.

My argument against its validity will be divided into three propositions—

1. The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid reading matter to be marked as an advertisement.

2. The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any law "abridging the freedom of the press."

3. The requirement that a certain class of newspapers shall disclose to the public by publication the most intimate details of their business, and use their own capital, labor facilities and valuable space for such disclosure, is a taking of "liberty" and "property" without due process of law and a like taking of valuable property rights for an assumed public use without just compensation."

ARGUMENT OF THE LAW.

I.

The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the Power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid matter to be marked as an advertisement.

While no *express* power for such a law will be claimed the Government will seek to sustain it as an *implied* power necessary to the *express* power "to establish post offices and post roads" (Art. I., Sec. 8). It has been well said :

" No other constitutional grant seems to be clothed in words which so poorly express its object or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post offices and post roads is the form of the grant ; to create and regulate the entire postal system of the Government is the evident intent."

Pomeroy on Constitutional Law, Sec. 411.

It was originally thought—indeed as late as the administration of President Monroe—that the only purpose of the grant was to designate the routes over which the mails should be carried and the post offices where it should be received and distributed. At the time the Constitution was framed, the carriage of the mails was a private enterprise, although the estab-

lishment of post offices was a governmental function. This was the view of President Monroe, when he vetoed the Cumberland Road Bill on May 4, 1822. The carriage of the mails is therefore in itself an implied power.

These earlier and narrow views of an important governmental power are, however, academic, for I freely concede that, however unhappily expressed, the Constitution meant to give to the Federal Government full power to make a monopoly of the carriage and distribution of the mails, and that all "*necessary and proper*" means are to be regarded as fairly embraced in the power.

The present law as an alleged implied power must therefore be subjected to the acid test of Chief-Justice Marshall :

" Let the end be legitimate, let it be within the scope of the Constitution, and all means *which are appropriate*, which are *plainly adapted to that end*, which are not prohibited but *consistent with the letter and spirit of the Constitution*, are constitutional."

Is the enforced disclosure and publication of the most intimate secrets of the ownership and editorial management of a newspaper and the circulation thereof a means "*plainly adapted*" to the carriage of the mails ?

Is it an "*appropriate*" method ?

Is it "*consistent with the letter and spirit of the Constitution*," in view of the express declaration that the freedom of the press shall not be "*abridged*?"

When governmental powers—only *enumerated* in the Constitution in the broadest and most general way—pass to the stage of necessary definition through judicial decisions, restrictions are imperatively necessary, unless the Constitution itself is to fall into cureless ruin.

The commanding genius of Marshall and his associates quickly recognized the absolute necessity of the judiciary confining both the national and State Governments within their respective spheres by so *defining the enumerated powers* as to create a harmonious though dual system.

In the case of *McCulloch v. Maryland*, 4 Wheaton, 423, the Chief Justice laid down for all time this great and absolutely necessary rule of interpretation as follows :

“Should Congress, *under the pretext of executing its powers*, pass laws for the accomplishment of objects *not entrusted to the Government*, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, *to say that such an act was not the law of the land.*”*

* Hamilton, in the Federalist No. 33, said :

“The priority of a law in a constitutional light must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot be easily imagined) the federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the state? Suppose again that upon the pretense of an interference with its revenues it should undertake to abrogate a land tax imposed by the authority of the state, would it not be equally evident that this was an invasion of

The government may contend that the later decisions of this Court modify, if not altogether abrogate, this primary and vital principle of constitutional construction. The line of cases, of which *Veazie v. Fenno*, 8 Wall., 533, is the leading case, will probably be cited, in which the doctrine is laid down in various forms but substantially to the following effect:

“The judiciary cannot prescribe to the legislative departments of the Government limitations upon the exercise of *its acknowledged powers*. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected.”

It was clearly shown in subsequent decisions that the decision in *Veazie v. Fenno* was amply justified in the exclusive power of the Federal Government to establish an exclusive currency, with the incidental power to “restrain by suitable enactments the circulation money the notes not issued under its own authority.” The statement in that case, therefore, that “the judiciary cannot prescribe the legislative

that concurrent jurisdiction in respect to these species of tax which the Constitution plainly supposes to exist in the State governments?”

The fatal effect upon constitutional government of any other course was pointed out by Senator Hayne in his great debate with Webster, when he said that if Congress

“may use a power granted for one purpose for the accomplishment of another and very different purpose, it is easy to show that a Constitution on parchment is worth nothing.”

department of the Government limitations upon the exercise of its acknowledged powers" was mere obiter. This decision means nothing more than that the "acknowledged," *i. e.*, conceded powers, cannot be restricted by the judiciary to prevent some supposed injustice. If, therefore, the Constitution had given the Federal Government power to regulate journalism and provide the conditions under which a newspaper could be published, the judiciary could not limit the power because a particular method of enforcing it seemed unwise or unjust. Much less could it invalidate such method, because the Judiciary believed that the methods of Congress were improper and inconsistent with the spirit of the Constitution.

It must also be remembered that in *Veazie vs. Fenno*, Chief Justice CHASE also said :

" There are indeed certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self government of the States *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

Reading these excerpts from this leading case together, it must be obvious that in considering the constitutionality of any statute, we "beg the question" if we first assume the power and then simply deny the right of the Judiciary to place limitations upon its exercise. In *Veazie vs. Fenno*, this Court did not hold that the motive and object of Congress

might not be very pertinent in determining this primary question of power. On the contrary, this Court ruled that if the legislation were clearly within the Constitution, the motives of Congress were beyond judicial inquiry. This Court has never conceded—and I venture to predict never will concede—that Congress may use a power given only for one purpose for an entirely different and unconstitutional purpose. In this class of cases, reasoning in a circle must be carefully avoided.

A later and more striking case is *McCray v. United States*, 195 U. S., 27, in which this Court, having under consideration the constitutionality of the designedly prohibitive tax upon oleomargarine, held that the judiciary could not inquire into the "*motive or purpose*" of Congress in adopting a statute levying an excise tax within its constitutional power.

There is no necessary inconsistency between these two lines of decisions.

The latter line of cases are generally, if not invariably, instances of *express* powers, like that of taxation or the regulation of commerce, and as to these this Court has said that they, being what Marshall called "acknowledged powers," the judiciary *ex necessitate rei* can neither limit them further than they are expressly limited in the Constitution nor impeach the power by questioning the uncertain motives of Congress.

A very different question arises and must arise where the exercise of an *implied* power is under consideration. There the law finds no warrant in the

letter of the Federal Constitution. The power has not been expressly granted. It is confronted with the Tenth Amendment, expressly reserving all undelegated powers to the States.

Indeed implied powers are derived from the section of the Constitution which gives "power to make all laws *necessary and proper* for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the Government or in any of its departments or officers." While no narrow, literal and impracticable meaning can now be given to the words "necessary and proper," yet, as Mr. Justice STORY said in his great commentary on the Constitution, these words "are at once admonitory and directory," and they require that the means used in the execution of an express power "should be *bona fide* appropriate to the end."

Hepburn v. Griswold, 8 Wallace, 603, 614.

"Every valid Act of Congress must find in the Constitution some warrant for its passage."

United States v. Harris, 106 U. S., 636.

*An alleged implied power, as in the case at bar, must justify itself by showing that it is "necessary and proper" and "plainly adapted" to carrying out some express power.**

* State powers and Federal powers are mere complements of each other and to both can be applied the words of this Court in *Mugler v. Kansas*, 123 U. S., 623.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate

The question in this case, as in every similar case, is not whether this legislation is an exercise of a *delegated* federal power for some ulterior or improper purpose, but whether, having regard to the Constitution as a whole and giving due effect to all the limitations of the Amendments—particularly the Tenth—the *specific legislation is within the true definition of the power.*

When therefore a law is passed under the pretense of exercising a federal power and it is not “necessary and proper,” “appropriate” or “plainly adapted” to such power, then the judiciary declares it invalid, not as withdrawing from the Federal Government anything delegated by the Constitution, *but in more accurately defining the nature of the power.*

While this Court has with reason exercised this

exercise of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Cases*), 99 U. S. 700, 718, the courts must obey the constitution rather than the law making department of government, and must, upon their own responsibility, determine whether, in any particular case these limits have been passed. ‘To what purpose,’ it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, ‘are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.’ The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.”

great power sparingly, yet the number of federal enactments that have been adjudged unconstitutional is sometimes underestimated. Without pretending to have made an exhaustive search of the authorities, I have found twenty cases in which federal enactments were thus adjudged unconstitutional by this Court. In one of these (the *Legal tender Cases*) the decision was subsequently reversed. Of the remaining nineteen, twelve were adjudged void for want of power and seven because they contravened some express constitutional limitation. The cases are :

Marbury v. Madison, 1 Cranch, 138.

Decided 1803 ;

Dred Scott v. Sanford, 19 How., 393.

Decided 1857 ;

Ex Parte Garland, 4 Wallace, 333.

Decided 1866 ;

The Alicia, 7 Wallace, 571. Decided 1868 ;

Hepburn v. Griswold, 8 Wallace, 603.

Decided 1869 ;

Justices v. Murray, 9 Wallace, 274.

Decided 1869 ;

Collector v. Day, 11 Wallace, 113.

Decided 1870 ;

United States v. Klein, 13 Wallace, 128.

Decided 1871 ;

United States v. Reese, 92 U. S., 214.

Decided 1875 ;

Trademark Cases, 100 U. S., 82. Decided 1879 ;

United States v. Harris, 106 U. S., 629.

Decided 1882 ;

- Civil Rights Case, 109 U. S., 3. Decided 1883;
 Boyd v. United States, 116 U. S., 616. Declared invalid 1886;
 Monongahela Navigation Co. v. U. S., 148 U. S., 312. Decided 1893;
 Income Tax Case, 157 U. S., 429. Decided 1895;
 Wong Wing v. United States, 163 U. S., 228. Decided 1896;
 Fairbank v. United States, 181 U. S., 283. Decided 1901;
 James v. Bowman, 190 U. S., 127. Decided 1903;
 Employers Liability Cases, 207 U. S., 463. Decided 1908;
 Adair v. United States, 208 U. S., 161. Decided 1908.

In the case at bar the pretense is that the law is an appropriate and necessary means of carrying out the power to regulate the establishment of post offices and post roads and the carriage of the mails. *The declaration of Congress to this effect, while entitled to respect, cannot conclude the question.* It remains for the judiciary to determine whether the means are thus "necessary and proper", "appropriate" and "plainly adapted."

This question presents a graver aspect of this constitutional problem than has ever developed before. The idea has in recent years gained ground among many eminent publicists and statesmen that certain powers granted to the Federal Government can be so utilized as to penalize men into submitting to govern-

mental demands which would otherwise be unconstitutional. In other words, that which the Federal Government cannot do directly, it is attempted to do indirectly.

I call this nullification by indirection.*

* There is a growing belief in a power of Congress to compel the citizen to do things in themselves beyond the direct powers of the Federal Government, under penalty of a denial of some valuable privilege under the Constitution, such as the facilities of interstate commerce. The section of the Hepburn Bill known as the Commodities Clause, was based upon this novel and most dangerous doctrine that Congress, by reflex action, could compel railroad corporations to do that which otherwise Congress had no power to require, under penalty of being denied the privilege of engaging in interstate commerce.

On this same theory was based Senator Beveridge's Child Labor Bill, which in effect attempted to prohibit the interstate transportation of any commodity, however innocent in itself, if it were the product of child labor. This attempt to compel action in matters beyond the scope of the Federal Government, through a species of statutory duress, gained remarkable ground in the congressional discussion of the Trust problem, where it was again and again suggested that if the federal power could not directly interfere with the formation and operations of large domestic State corporations, it could indirectly by so exercising alleged federal powers as to make it impossible for the State corporations to exist when they reached the commercial dimensions of a so-called Trust.

Thus it was suggested that a destructive internal revenue tax could be imposed as had been done with the currency of State banks; graded excise taxes were proposed to discourage excessive capitalization; the mails were to be denied to monopolistic trusts. The denial to them of a right of appeal to the Federal Courts was also suggested. National banks and other governmental fiscal agencies were to be prohibited from receiving on deposit or accepting as collateral any stocks, bonds or securities of a trust. It was even suggested that the United States Government should not deposit government moneys in any bank, which in any manner deals with the stocks, bonds or securities of a trust. No corporation should engage in interstate commerce without obtaining a federal charter and subjecting its contracts to the supervision of a Government Bureau. Trust made commodities were to be forbidden access to the channels of interstate and foreign trade.

Putting together the two remedies, it must be admitted that they would be sufficiently drastic, for if a large corporation can neither sue in the Federal Court, transport its freight on interstate railroad lines, import its raw material in foreign commerce, telegraph a message, mail a letter or enjoy the usual national banking facilities, its outlawry would be complete.

The present case affords a striking illustration of this new gospel of subverting the Constitution by a perversion of Federal powers, at which the framers of the Constitution would have stood aghast. Following the scheme of unconstitutional duress, the law simply provides that the owners of a newspaper must file with the Postmaster General, and later publish in their newspapers, the names and addresses of the editors, owners, creditors, etc., and the amount of the circulation, and shall brand paid reading matter as an advertisement, and, conscious of its inability to enforce such requirements under any *express* grant of the Constitution, Congress attempts to compel the owners of newspapers to submit to these unlawful demands by penalizing them with exclusion from the mails and liability to a fine.

Is such duress within any true definition of Federal powers ?

Is it a due regulation of the mails for the Federal Government to say to a citizen, "Unless you do certain things, which we have not otherwise the power to compel you to do, we will deny you the facilities of the mail" ?

If such a right exists, then it must be obvious that our government is not one of effective restrictions. Congress, exercising a group of powers which are absolutely vital to the well being of every citizen, can coerce him into doing anything that Congress requires, under penalty of a denial of the ordinary privileges of a citizen.

Independent of the Bill of Rights, there must be

ex necessitate rei some restriction of the power to use the mails as a club to secure ends not within the scope of the Federal Government.

Could Congress provide that no physician should use the mails unless he has filed a statement giving his name, address, property holdings, liabilities, the number, names and ailments of his patients and a declaration that he would only practice as an allopath? If the power over the mails be plenary and absolute, what clause in the Bill of Rights expressly forbids it?

It is not a question of the motives of Congress or the policy of the law. *It is a question of power* and it is inconceivable that the framers of the Constitution, jealous as they were of the powers of the Government which they had created, would ever have given the Federal Government such power over the private affairs of the American people.

The Authorities.

The decisions of this Court, from its earliest history, leave no doubt that in a proper case the Supreme Court will not permit such nullification by indirection as results from the perversion of federal powers to accomplish indirectly unconstitutional ends.

It cannot be doubted that if Congress had passed the law now under consideration as a special statute and not as a part of a Post Office appropriation bill, and had omitted any reference to the mails, this Court would hold that the Constitution not only did not grant such a supervisory power over the press but by the First Amendment had expressly prohibited it.

Can it be possible that what Congress could not do directly it may nevertheless accomplish indirectly by the pretense that such supervision is necessary in order that the Post Office Department may suitably carry on its important function ?

As Mr. Justice BREWER in *Fairbank v. United States* (181 U. S., 283, 294), speaking of the previous decision of *Woodruff v. Parham* (8 Wallace, 123), said :

" In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result. . . .

The form in which the burden is imposed cannot vary the substance . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and cannot be evaded by any legislation which, though not in terms trespassing upon the letter and spirit, yet in substance and effect destroy the grant or limitation."

As was said by this Court in *Union Bridge Co. v. United States* (204 U. S., 364, 397) :

" If the means employed have no real substantial relation to public objects which the Government may legally accomplish ; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such il-

legal action. The authority of the courts to interfere in such cases is beyond all doubt."

See, also,

Lochner v. N. Y., 198 U. S., 45 ;

Mugler v. Kansas, 123 U. S., 623 ;

Chicago R. R. v. Drainage Comrs., 200 U. S., 561 ;

Reagan v. Farmers Loan & Trust, 154 U. S., 362.*

Nor can it matter that the law now under consideration may incidently and to some extent relate to the due administration of the Post Office Department, for even a regulation of interstate commerce may be invalid if its enforcement involves a direct interference with intrastate commerce.

In the Trademark cases, 100 U. S., 82, Mr. Justice MILLER said :

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature that it is a regulation of

* Even where the power asserted is the power to tax—the most sweeping, unlimited and fundamental of governmental powers—this court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the Government against fraud (*Pace v. Burgess*, 92 U. S., 372) ; between a tax on exports and a mere stamp duty on a document (*Fairbank v. United States*, 181 U. S., 288) ; between a tax and a penalty (*Helwig v. United States*, 188 U. S., 605) ; between a tax and an improper burden on interstate commerce (*Atlantic Telegraph Co. v. Philadelphia*, 190 U. S., 160) ; between a legitimate regulation of rates and a confiscation of private property (*Smyth v. Ames*, 169 U. S., 466).

commerce with foreign nations or among the several States, or with the Indian Tribes. *If not so limited*, it is in excess of the power of Congress. *If its main purpose be to establish a regulation applicable to all trade*, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State; it is obviously the exercise of a power not confided to Congress."

Applying the doctrine of these decisions to the case in hand, I submit that this Court should hold either

1. That the law in question is not in substance and effect a regulation of the mails but a regulation of journalism; or

2. That even if the law is to be regarded as an attempt to regulate the mails, the means employed are, to apply the test of *McCulloch v. Maryland*, not "within the scope of the Constitution", not "appropriate", "not plainly adapted to that end" and not consistent "with the letter and spirit of the Constitution", and not "limited" to a fair exercise of federal power.

I recognize that the power under the Post Office Roads clause has been defined by this Court in *Public Clearing House v. Coyne* (194 U. S., 497) as "the regulation of the entire postal system of the country".

But what is the postal system of the country? Is it more than the collection, carriage and distribution of letters, documents or other merchandise sent by one

citizen to another? It cannot be questioned that this power embraces the right to exclude from the mails any matter that is unlawful or immoral. In other words, the Government is not required to be an accessory in distributing immoral literature.

As stated in *Public Clearing House v. Coyne* (*supra*), such regulation includes the power to exclude from the mails any matter that would be "dangerous to its employees or injurious to other mail matter carried in the same packages". But in the opinion in that case, especially in the first clause of the syllabus, it is intimated that the power is not arbitrary, for

"Congress would have no right to extend to one the benefit of its postal service and deny it to another person in the same class and standing in the same relation to the Government."

I concede that in

Ex parte Jackson, 96 U. S., 727 ;
In re Rapier, 143 U. S., 110 ;
Horner v. United States, *id.*, 207 ;
Public Clearing House v. Coyne, 194
 U. S., 497,

this Court has recognized a sweeping power in the Federal Government to determine what it shall and what it shall not carry in the mails. But in all these cases the law simply provided that matter that was either immoral or fraudulent should not be carried in

the mails. It did not pretend to prohibit the publication or circulation in any other way of the matter deemed to be immoral or fraudulent, nor did it attempt otherwise to exercise any police power with reference thereto. It simply declined to give the immoral or fraudulent enterprise the assistance of mail facilities. Those who were engaged in the nefarious traffic could, so far as the postal law was concerned, pursue their way undisturbed, provided they did not attempt to use the mails to further their unlawful ends.

All previous laws have always observed this distinction between regulating an exercise of the federal power such as the carriage of mails and punishing generally a given evil. Congress has excluded from the mails any newspaper which contained a lottery advertisement, but it has not legislated with reference to lotteries. The line of demarcation has always been drawn and admits of no dispute.

In the case at bar, however, the exclusion from the mails is but an incident to the law and is merely introduced into the act as a method of compelling obedience to the other provisions. It seeks to compel newspapers to disclose the secrets of their business, not only to the Post Office Department but to the public, and it requires them to notify the public when any reading matter has been inserted for a consideration.

Are these requirements "*appropriate*" to the carriage of the mails? Are they "*plainly adapted*" to that end? In the collection, carriage and distribution of newspapers, how can it matter to the Federal

Government who the editors are, who, the mortgage creditors and what is its circulation.

In the Lottery case (188 U. S., 321) I argued for the Government that the power to regulate interstate commerce was plenary and absolute, but I disclaimed any suggestion that it could be used for any purpose, however arbitrary or remote from the great purposes of the Federal Government. My opponents attempted a *reductio ad absurdum* by arguing that if the power were exclusive and plenary and included a right to prohibit as a regulation, then Congress could

“arbitrarily exclude from commerce among the States any article, commodity or thing of whatever kind or nature or however useful or available which it may choose, no matter with what motive, to declare shall not be carried from one State to another.”

This Court disclaimed any such conclusion and significantly added—

“We may, however, repeat in this connection what the Court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, *cannot be deemed arbitrary* since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress

was invested with the general power to regulate commerce among the several States.

* * * If what is done by Congress is manifestly in excess of the powers granted to it, then upon the Courts will rest the duty of adjudging that its action is neither legal nor binding upon the people."

The attitude of this Court, however, cannot be doubted since the case of *Adair v. United States*, 208 U. S., 161, 178, decided 1908.

Congress had attempted to regulate interstate commerce by a law prohibiting an interstate carrier from discriminating against organized labor and in its judgment such a law was necessary to prevent obstructions through labor controversies of the free flow of such commerce.

If, therefore, the doctrine of *Veazie Bank v. Fenno* and *McCray v. United States*, were, as the Government now contends, that the judiciary can neither inquire into the motive of Congress in determining the question of power nor restrict the exercise of such power within the limits of the Constitution, but must leave these questions wholly to the discretion of Congress, then it would necessarily follow that this attempted regulation of commerce was constitutional, or at least beyond judicial review. This Court, however, reached the conclusion that, the declaration of Congress to the contrary notwithstanding, Section 10 was not a regulation of commerce. This Court said—

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be

within the competency of Congress under its power to regulate commerce among the States, *must have some real or substantial relation to or connection with the commerce regulated.* But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services. . . . If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353. It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not

embraced by nor within the power of Congress to regulate interstate commerce, but *under the guise of regulating interstate commerce* and as applied to this case it arbitrarily sanctions an illegal invasion of the personal *liberty* as well as the right of property of the defendant Adair."

In the Employers' Liability Cases, 207 U. S., 463, 502, decided in 1907, the same question arose as to the power of the Federal Government, to include within an otherwise valid law provisions, which were beyond the power of the Federal Government. There a law was under consideration regulating the liability of interstate carriers for injuries to their employees, but in providing a remedy the law was not restricted to employees while engaged in interstate commerce. This Court held that the law as a whole was unconstitutional.

Incidentally it disposed of the contention, which underlies the Government's proposition in the present case, as to whether Congress can so use its conceded powers as to reach objects beyond its scope. Thus it was there contended that when a carrier engaged in interstate commerce, it thereby subjected itself to the power of the Federal Government, not merely with respect to interstate commerce but as to all its business. To this contention this Court replied—

"To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress

with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

The language of these two opinions, representing the latest expression of this Court, could be applied with little change of language to the present case. As in the Employers' Liability Cases, the Government now contends in substance that if the newspaper publishers of this country wish to enjoy the facilities of the mails, they must do so upon the conditions that Congress imposes and must subject their business details to any regulation which Congress may prescribe as a condition of using the mails.

As in the Adair case, the Government now con-

tends that the mere fact that we wish to enjoy mail facilities makes it competent for Congress to legislate with reference to business details, which have only a very remote if any relation to the carriage of the mails.*

In each of these cases laws were declared invalid because there was no just relation between them and the legitimate object sought to be accomplished.

* Apart from these recent cases, there are a number of earlier cases equally illuminating. I shall only select a few.

In *United States v. Fox*, 95 U. S., 670, the validity of an Act of Congress, which made it a penal offense for any person to obtain goods on credit three months before proceedings in bankruptcy, on the false pretense of dealing in the ordinary course of trade, was held invalid, as having no reasonable relation to the federal power over bankruptcy. Mr. Justice FIELD said :

" Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers * * * may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, *unless it have some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States.*"

In *United States v. Reese*, 92 U. S., 214, a law passed by Congress in enforcement of the Fifteenth Amendment was held invalid because it went further than was necessary or proper to carry out the power committed to Congress.

Similarly in the case at bar we contend that the Act has gone further than is either necessary or appropriate in regulating the carriage of the mails.

See also—

Dent v. W. Va., 129 U. S., 114 ;

Cummings v. State of Missouri, 4 Wallace, 277.

II.

The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any enactment "abridging the freedom of the press".

Assuming for the sake of argument that in the absence of the First Amendment such a censorship of the press would be an implied power incident to the regulation of the mails, yet such power was expressly withheld by the First Amendment, which forbade any law "abridging the freedom of speech or of the press".

All provisions of the Constitution must be read together and thus read together the Constitution virtually provides that Congress shall have the power

"to establish Post Offices and Post Roads", and for this power "to make all laws which shall be necessary and proper", *provided*, however, that it shall make no law "abridging the freedom of the press."

What is the freedom of the press? To determine this question we must resort to the history of the times, when the Constitution was framed, for the expressions used in the ten Amendments must be given the meaning attached to them at the time the Constitution was adopted (*Boyd v. United States*, 116 U. S., 616).

Thus interpreted, it cannot be questioned that the liberty of the press means the liberty of free discussion in print, without any restraint save that

which was imposed by the law of libel and by certain axiomatic principles of morality, such as the prohibition either of fraud or obscenity.

With these exceptions, the liberty of the press was the right to print one's opinions, whether they were wise or foolish, whether they were consistent with or contravened accepted ideas or ideals, and to do this *without any restraint by the Government*, save that which was clearly and necessarily demanded to prevent either immorality or fraud.

The necessity of this freedom need not be enlarged upon. Our Government rests upon public opinion and its perpetuity must depend upon the education of that opinion.

It is therefore the policy of our Constitution that no burden shall be imposed upon the press, no restriction upon its rights, no impairment of its influence, excepting only in matters of axiomatic morality and subject always to responsibility at common law for libellous statements.

The restriction of the press has taken two forms, and the struggle over each has marked a different stage in the long battle for the freedom of the press.

The first stage was the censorship of the press. It acted *by anticipation* and its essence was a previous restraint of printed thought and not its subsequent punishment.*

* Recognizing the enormous power of the press, the Crown in England considered that the licensing of the press was a part of the royal prerogative and it at first attempted to prohibit the printing of anything which was not *viced* by the Government and secondly by vesting the

In 1695 Parliament abolished the whole system of censorship and, as Macaulay has said, this action has "done more for liberty and civilization than the great charter or the bill of rights."

The other and remaining stage of the long battle was the attempt *retrospectively* to censor the press by punishment. Obviously the freedom of the press would be of little value and would be rarely exercised if after freely printing the author or publisher could be subjected to such punishments as were

exclusive privilege of printing in a few institutions, as the two Universities and the Printers and Stationers Company of London. Later the power was fittingly lodged in the Star Chamber and after the Restoration of Charles the Second, a subservient Parliament again vested it in the Crown.

May's Constitutional History of Eng., Vol. II, pp. 102-6;
Anstis v. Carrington, 19 How. State Trials, 1029;
Erskine's Speech for Th. Carran, Dices Law of the Constitution, p. 274.

It was this form of censorship, even at the hands of the Long Parliament, which in 1648 drew from John Milton his *Areopagitica*, in which he defended the liberty of the press in unrivalled splendor of rhetoric and prophetically anticipated the day when his "noble and puissant nation" would rouse herself "like a strong man after sleep" and "purge and unscale her long abused sight at the fountain itself of heavenly radiance; while the whole noise of timorous and flocking birds with those also that love the twilight flutter about amazed at what she means and in their envious gabble would prognosticate a night of sects and schisms."

The infamous Licensing Act, against which Milton inveighed in his *Areopagitica* was constructed on the same lines as the present Act of Congress, for the English Act of September 30, 1649 provided that

"no person whatever should presume to send through the post, carriers or otherwise or endeavor to dispense any unlicensed book", etc.

Then, as now, the plan was to strike at the freedom of communication by exclusion from the mails. It is also interesting to recall that almost the last act of the Star Chamber of malodorous memory was its assumption of power to restrain and publish what it chose to regard as libellous statements.

known to the rigor of the English law. It was soon established that no man could be punished for publishing any writing, unless it was at common law either libellous or criminal in character, and the struggle between freedom and tyranny largely turned on the question as to the method of determining whether a publication were libellous. After a memorable contest, which "shook the foundations of Westminster Hall," it was finally decided in aid of the freedom of the press that a jury and not a magistracy should determine whether the printed matter was unlawful at common law.*

When our Constitutional Convention met, the

* There is no greater battle in the constitutional history of the English race than that which was waged to defend the rights of a jury and to withhold from the bench appointed by the Crown the power to determine the unlawful character of any printed matter. On the one hand was Lord MANSFIELD, whose great influence induced the twelve judges to claim this vital right for the bench, and on the other hand were the master spirits of the English bar, CHATHAM, CAMDEN, BURKE, FOX, SHERIDAN and others.

MANSFIELD's decision in *King v. Woodfull*, in 1770, 20 State Trials, 1895, resulted in an acrimonious debate in Parliament, in which Sargeant Glyn, Dunning and Burke attacked the decision, and Thurlow and Fox defended it. Fourteen years later the question was again debated in the case of *King vs. The Dean of Asaph*, in which Erskine made his closing argument, but Erskine's contention had been anticipated in the Courts of New York by Andrew Hamilton of Philadelphia, in the famous *Zenger* case.

Lord KENYON, in *Rex v. Cuthill*, 27 State Trials, 675, laid down the rule, which was finally adopted, as follows:

"After all, the truth of the matter as to the liberty of the press is very simple when stripped of the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes what is blamable. This in plain common sense is the substance of all that has been said upon the subject."

struggle was over. The liberty of the press had triumphed and it was then universally recognized both in England and America, that the liberty consisted not merely in freedom from punishment except by a verdict of a jury, *but that it also consisted of exemption from any burdensome or unreasonable restraint.* When therefore the new Constitution was adopted without any bill of rights, the new Government promptly passed, in accordance with the general understanding, the first ten Amendments, and it is significant that in the very first there was this clause that none of the powers previously granted to the Federal Government should be so exercised as to abridge the freedom of the press.

The word "abridge" is most significant. The prohibition is not directed only to such laws as *destroy* the freedom of the press. If so, it might have been argued that any law which restrained the liberty of printing but did not altogether forbid it, was permissible. The Fathers, however, used the word "abridge" meaning thereby "to lessen or diminish." *They desired to preserve the full fruits of the long constitutional struggle.* They wished to have the press enjoy complete freedom, subject only to the qualifications above expressed.

There have been few judicial interpretations of the First Amendment, and this because the liberty of the press as a basic principle is so rooted in the minds of the public that with two exceptions no party has ever attempted to contravene the First Amendment.

In 1798 Congress did pass the Sedition Law, which sought to make libels upon the United States Government punishable, just as libels against the British Government had always been punishable at common law. The constitutionality of the law was bitterly assailed by Jefferson, Madison and others, and the political controversy which resulted, led to the Virginia and Kentucky Resolutions, which contained the germ of nullification and secession. The law was repealed before it ever reached this Court.

In 1836 the question again arose in the heated Anti-Slavery agitation, when an attempt was made to exclude Anti-Slavery literature from the mails. It is to the lasting honor of John C. Calhoun, Chairman of the Special Committee, to whom the proposed law was referred, that, notwithstanding his interest in the maintenance of negro slavery, he denied that the Constitution gave Congress any such power except to prevent the delivery of such matter in States where by local laws it was unlawful. *

* In the debate that followed, Henry Clay said :

" When I saw that the exercise of a most extraordinary and dangerous power had been announced by the head of the Post Office and that it had been sustained by the President's Message, I turned my attention to the subject and inquired whether it was necessary that the Postmaster General should under any circumstances exercise such a power and whether they possessed it. After much reflection I have come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatever. The evil complained of was the circulation of papers having a certain tendency. These papers, unless circulated and while in the Post Office, could do no harm. It is the circula-

It is to the credit of Congress that after a full discussion the proposed law was voted down by a vote of 25 to 19 on the ground of its unconstitutionality.

I concede that the present form of censorship is mild by comparison with previous forms. I also ad-

tion solely—the taking out of the mail and the use to be made of them—that constitutes the evil. Then it is perfectly competent for the State authorities to apply the remedy."

To the question of Senator Buchanan, of Pennsylvania, as to whether the Post Office power had not given to Congress the right to determine what should be carried in the mails, Clay replied in the negative, adding :

"If such a doctrine prevailed, the Government may designate the persons or parties or classes who shall have the benefit of the mails, excluding all others."

Senator Davis said :

"It would be claiming on the part of the Government a monopoly and exclusive right either to send such papers as it pleased or to deny the privilege of sending them through the mail. Once establish the precedent, and where will it lead to? *The Government may take it into its head to prohibit the transmission of political, religious or even moral philosophical publications*, in which it might fancy there was something offensive, and under this reserved right, contended for in this report, it would be the duty of the Government to carry it into effect."

He also denied

"the right of the Government to exercise a power indirectly which it could not exercise directly, and if there was no direct power in the Constitution, he would like to know how they would get the power of the States—legislative power at most."

Daniel Webster expressed himself as "shocked" at the unconstitutionality of the proposed law, saying :

"Any law distinguishing what shall or what shall not go into the mails, founded on the sentiments of the paper and making a Deputy Postmaster a judge I should say is expressly unconstitutional."

mit that a large majority of the newspapers could submit to this censorship without any practical impairment of their liberty to print or diminution of their influence. But it is equally true that this form of censorship would in many instances affect disastrously the liberty to print. It is a reasonable possibility that the enforcement of this law might destroy some newspapers. It is certain that with the exception of the limited few newspapers which enjoy an immense circulation, this form of censorship would impair the influence of many newspapers.

The clause with reference to printing paid matter as an advertisement would in many instances destroy the opportunity of classes and individuals to get their views before the public.

If these suggestions are true, then the freedom of the press is abridged in that there is not the same full, free, unimpaired right to print and circulate newspapers as existed before the passage of the law.

Without amplifying all of the destructive possibilities of the law, it will suffice to discuss three which are apparent on its face—

1. The law provides that a newspaper must disclose its circulation not only to the Government but to the public. Such disclosures would in many instances go far to destroy the influence of the paper in the minds of the masses, and that without justice or reason. A newspaper having a circulation of 30,000 may have more real influence than a news-

paper having a circulation of 300,000. The first newspaper may find its readers among the educated, thoughtful and influential class, whose views profoundly affect their fellow men. The other newspaper may be read largely for its sporting page or its divorce reports. At present the influence of both papers is measured largely by the comparative character of their editorial utterances, but if it were published to the world that one reached but 30,000 readers and the other 300,000, the influence of the first paper would be substantially impaired.

Such impairment might result in destruction, for it is well known that a newspaper pays its way by advertisements and not by the copies which it sells. The latter, apart from advertisements, are sold at a loss, and anything that destroys the advertising business strikes the newspaper a fatal wound. It is safe to say that there is not a newspaper in the United States that could be continued at a profit, if its advertisements are withdrawn. Manifestly a disclosure of circulation to the public would lessen the business of the paper of small circulation and increase that of the paper with a large circulation, and this notwithstanding the fact that the paper of 30,000 readers might be a far more valuable advertising medium than the one with 300,000.

A great objection to this legislation is therefore that it weakens and tends to destroy the class of papers which most needs freedom from undue interference. The disclosure to the public of the intimate

details of business management would in many cases tend to drive the weak newspaper to the wall, for, armed with this knowledge, the strong and wealthy newspaper could readily impair the influence of its weaker rival, secure its business and drive it to the wall. There is possibly in no industry keener competition than exists between newspapers and therefore in none is there greater need on the part of the weaker competitors of privacy as to their business details.

There may be no absolute right of privacy and yet the owner of a business is entitled to safeguard the secrets of his business unless there is some reasonable and just occasion for a compulsory disclosure to the public of his private affairs.

As was said by Mr. Justice FIELD, in *in re Pacific Railway Commission* (32 Fed. Rep., 241, 250):

"Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault *but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.*"

This right of privacy and the sanctity of one's books and papers were never better emphasized than in the case of *Boyd v. United States* (116 U. S., 616), where Mr. Justice BRADLEY, in one of the ablest defenses of personal liberty, to which this Court ever gave utterance, defended the right of privacy against

oppressive federal regulations, even though they were enacted in execution of the most drastic of all governmental powers—the power of taxation.

There was far more justification, from the standpoint of the public interests, for the legislation which this court condemned in that case, than can be urged in behalf of the newspaper statute, whose obvious effect would be to impair the credit of the weaker newspapers, alarm their creditors and advertisers, impair their just influence with their readers, without in any manner assisting the Government in the effective and economical carriage of the mails.

2. The provision that there shall be a public disclosure of the editors and owners of the newspaper abridges the right to disseminate ideas impersonally.

I freely recognize the prejudice which to-day ordinarily and generally justly prevails against anonymity. But even anonymous arguments have played a useful art in past struggles for liberty and progress. To this day we do not know who wrote the letters of "Junius", and yet these letters were some of the most forceful blows struck in the great struggle for English freedom.

When the Constitution was submitted to the people for adoption, the most valuable arguments in its support were those submitted anonymously by Madison, Hamilton, Jay, Sullivan, Winthrop, Gerry, Ellsworth, Roger Sherman, Pinckney and many others. These were published under such *nom de plumes* as Publius, Cassius, Agrippa, Cato, Caesar, Sidney, Plain Dealer, Columbian Patriot, Plebian, etc., etc.

It is altogether probable that the Federal Constitution would never have been adopted by a sufficient number of States had it not been for the anonymous political pamphlets written over the *nom de plume* of "Publius", which we now know as the Federalist Papers. While Hamilton's identification with "Publius" was soon suspected by many, it was not until long after his death that it was known that many of these papers were written by Madison, Jay and others.

Nothing was more familiar to the framers of the Constitution than this method of impersonal pamphleteering.

When the burning issue of neutrality arose in the administration of Washington, Hamilton assailed the Secretary of State in pamphlets written under the *nom de guerre* of "Pacificus," and Madison replied under the name of "Helvedius." It was the exception when any political argument or other reading matter was written over the true name of the author. Franklin, while agent of the colonies in London, published his most effective arguments in their behalf anonymously in the English press.

Tempora mutantur, et nos mutamus, etc. Constitutional rights do not change and to-day a man has still a right to submit his views impersonally to his fellow men and if his personality unfairly prejudices the intrinsic merit of his facts or opinions he may on occasion be justified in withholding his name in order not to obscure the merits of what he advocates. If this be true of fugitive expressions, it is

especially true of a great continuing organ of public opinion like a newspaper.

As in interpreting the Constitution recourse must be had to the standards of thought and conduct of its framers, in order to determine its meaning and scope (So. Carolina vs. United States, 199 U. S., 437), it should be remembered *that no abridgement of the freedom of the press would have excited more opposition among those who framed the constitution than the compulsory disclosure of authorship.* They would have felt that an invaluable weapon against error had been taken from their hands.

An instance could reasonably be imagined of a man of large means, justly or unjustly unpopular with the masses, who might desire to submit either in his own defense or for the public good, some facts, ideas or proposed laws. For this purpose, he acquires a newspaper. If the fact of his ownership is known, he will not get any adequate hearing and his ideas, however intrinsically meritorious, would receive an exceedingly scant hearing. Has he not the same *right* to disseminate through the press his views impersonally, as another man has to do so over his signature ?

3. The provision as to paid matter goes a step further. Here is an undoubted attempt to impair the freedom of the press by the destruction of its influence. A man can only reach the minds of his fellow men on a large scale through newspapers or periodicals. He may have some idea or plan for the ultimate good of his fellow men, but of which his fellow man,

as so often happens, is ignorant. His ideas may be so novel as to excite little interest at first. Perhaps they are also unpopular. It cannot be expected that the owner of a newspaper will always donate his space and the labor of his printing establishment without compensation. If the man wishes to reach his fellow men, therefore, he must pay the newspaper for the privilege of using its columns.

The matter referred to may have no reference to merchandise or to anything commercial. In no sense can its insertion be regarded as a commercial advertisement. The opinions which he expresses are reading matter. If marked as an advertisement, the influence is largely impaired.

Take, for example, the campaign committee of a political party. It wishes to get before the people of the country certain facts with reference to operations of the tariff. If inserted in the newspaper as an advertisement, few will read it and those few will not give to the paid advertisement the serious attention which the article may deserve. The newspaper publishes it as reading matter and requires the Committee to pay the reasonable cost of the service. Does not the requirement that it be printed as an advertisement, with the destructive effect upon its influence as reading matter which such a branding necessarily entails, involve an abridgement of the freedom of the press? Is that freedom as complete and unimpaired after such a law is passed as before?

III.

The requirement that a certain class of newspapers shall disclose the most intimate details of their business and use their own capital, labor facilities and valuable space for such disclosure, is a taking of "liberty" and "property" without due process of law and a like taking of valuable property rights for an assumed public use without just compensation.

The Post Office power must also be regarded as subject to the Fifth Amendment.

I do not contend that the mere compulsory disclosure of ownership, editorial management and other business details to the Postmaster General is a taking of property without due process of law.

The Act goes further. It compels the newspaper proprietor twice a year to use the valuable space of his paper and his capital and labor facilities to print the statement. To set up the matter, print it, and distribute it, all require expenditure of capital. It is an enforced appropriation of valuable space for the assumed benefit of the public. It is as much a taking of property as if it compelled the owner to hire a hall and announce the facts to the public.

Even though this compulsory appropriation of the citizen's property and labor were not strictly a *physical* taking of his property, nevertheless it is a "taking" within the meaning of the Constitution. It was well

said by the Court of Appeals of New York, in *Forster vs. Scott* (136 N. Y., 584):—

“Whenever a law deprives the owner of the beneficial use *and free enjoyment of his property, or imposes restraints upon such use and enjoyment*, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. *All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.* It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.”

This interpretation of the Constitution only followed the undoubted doctrine of this Court, for this Court said, in *Lawton v. Steele* (152 U. S., 137):—

“The legislature may not, under the guise of protecting the public interests, *arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.* In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birth-

place, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson v. New York*, 92 U. S., 259."

As was said by Mr. Justice FIELD in *Munn v. Illinois* (94 U. S., 141) :—

"All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title or possession. *If the constitutional guaranty extends no further than to prevent a deprivation of title and possession and allows a deprivation of use and the fruits of that use, it does not merit the encomiums it has received.*"

This contention is strengthened when it is remembered that no other citizen desiring the use of the mails is subjected to any such requirement. Scientific, religious and temperance publications are relieved of any such expense, and as to circulation, all but daily newspapers are similarly exempted. The law therefore puts upon daily newspapers an unfair expense and a burden not imposed either upon other publishers or upon any other class of citizens.

Freely granting the power of classification, there is here such an unreasonable discrimination as to amount to a denial of the equal protection of the laws, and that phrase is synonymous with due process of law.

To amplify this argument would require a restatement of all that has been herein said as to the unreasonable character of this regulation. It is enough to say that not only does the Act seek to appropriate the space of newspapers without compensation, for an assumed public use, but it interferes with the liberty of contract in that a newspaper owner may not contract with one desiring to use his columns for the insertion of reading matter, except under burdensome conditions.

The law as a whole singles out the owners of newspapers and attempts to aim at them an oppressive postal regulation, which clearly offends the intimation given by this Court in *Public Clearing House v. Coyne* (*supra*), that

"Congress would have no right to extend to one the benefit of its postal service and deny it to another person in the same class and standing in the same relation to the Government."

Conclusion.

I need not emphasize the importance of this case. As already stated, the form of censorship now sought to be imposed upon the press of the country may seem mild by comparison with that of other countries in former times. The concession to Congress of the power to utilize the mails for the purpose of disciplining the free press of the country, would mean hereafter a stricter and more dangerous censorship, for in the matter of arbitrary power, "the appetite grows by what it feeds on."

The warning words of Mr. Justice BRADLEY, in *Boyd v. United States*, 116 U. S., 616, should never be forgotten :

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. * * * It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Respectfully submitted,

JAMES M. BECK.

New York, November 20, 1912.

APPENDIX.**The Newspaper Law.**

" (Public No. 336)

" (H. R. 21279).

" An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes,

*" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * **

" SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided, Further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds.

mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

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U. S. Supreme Court, D. C.
FILED.

DEC 2 1912

JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

NO. 819.

THE LEWIS PUBLISHING COMPANY,

a body corporate in law,

Complainant-Appellant,

against

EDWARD M. MORGAN, Postmaster in and for the
City of New York,

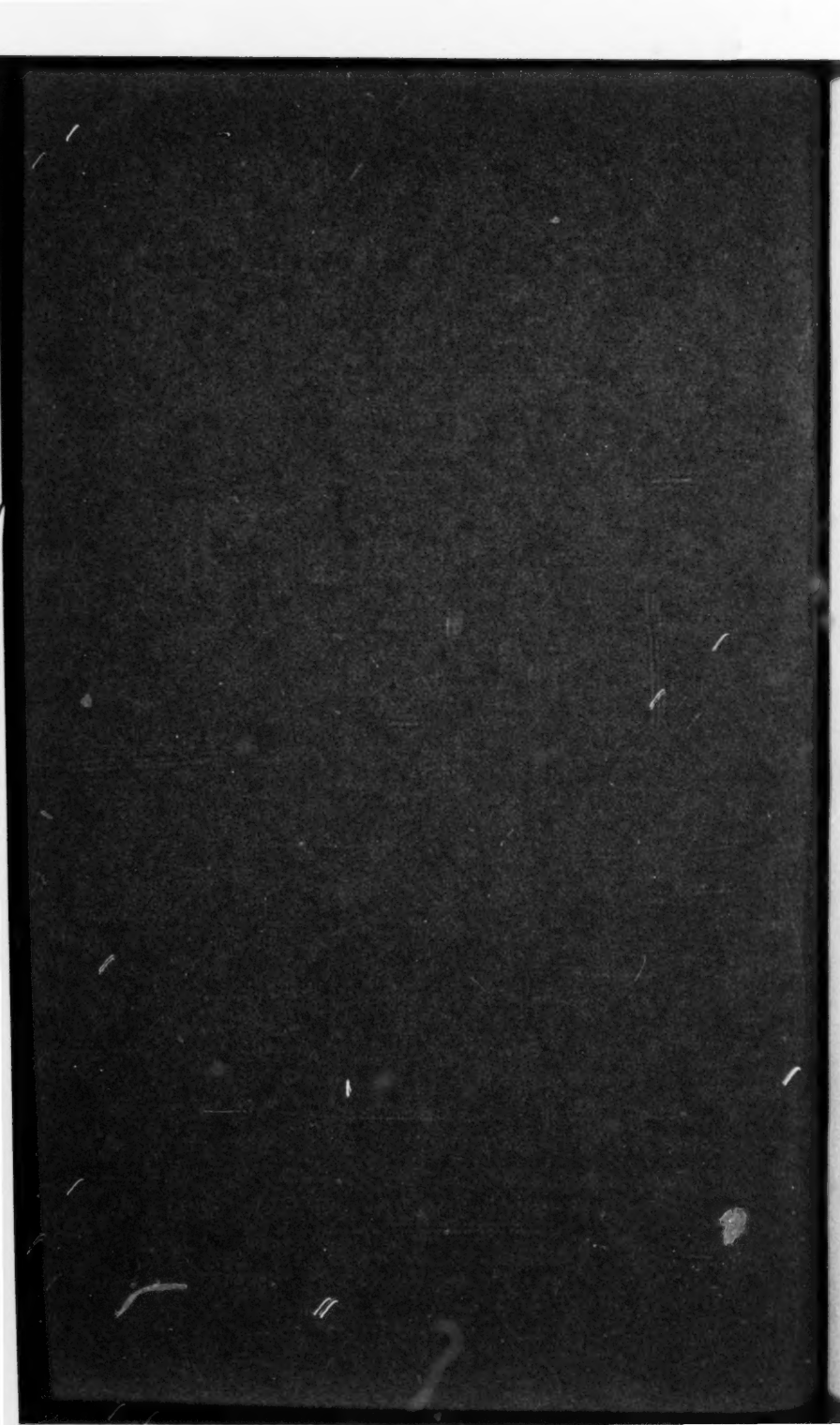
Defendant-Appellee.

THE INVALIDITY OF A FEDERAL CENSORSHIP OF THE PRESS.

APPELLANT'S REPLY BRIEF.

JAMES M. BECK,

Counsel for Appellant.



Supreme Court of the United States.

OCTOBER TERM, 1912.

THE LEWIS PUBLISHING COM-
PANY, a body corporate in
law,

Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Post-
master in and for the City of
New York,

Defendant-Appellee.

No. 819.

REPLY BRIEF FOR APPELLANTS.

The ingenious brief of the learned Solicitor General reached me too late to permit of any but a brief reply.

The construction, which he has attempted to place upon this unambiguous statute in order to save its constitutionality, does plain violence both to the letter of the statute and the clear indications of its meaning and purposes, as disclosed by its proponents in Congress (See Appellant's brief, page 5).

Where the scope and object of a statute is a pertinent matter, this court will resort to the history of the legislation and the declared purposes of its proponents. (See *United States v. Press Co.*, 219 U. S., p. 1.)

The Act itself is plain and unambiguous. It is made "the duty of the editor, publisher, business manager or owner of *every newspaper*" to comply with certain requirements, and failure to do so subjects the publication to a denial of "the privileges of the mail"—not the advantages of second-class rates only, but "the privileges of the mail" for any purpose connected with the publication, such as the receipt of subscriptions or of literary contributions to its columns. This negatives the theory of the Solicitor General that these requirements are merely a condition of the lower rates of postage.

I fully recognize that when a statute is "*reasonably* susceptible of two interpretations," and one of them is of doubtful constitutionality, the Court will accept the remaining interpretation. (*United States v. Delaware & Hudson R. R. Co.*)

The words just quoted are from the opinion of this court in that case, and in applying the doctrine, the italicised adverb must always be borne in mind.

This Court will not construct a new statute to save the face of Congress. It will give full credit to the reasonable meaning of Congress and if that be in violation of the Constitution, this Court will say so.

U. S. v. Reese, 92 U. S. 214.

James v. Bowman, 190 U. S. 127.

In the latter case, this Court said that—

“Courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction, which Congress might have legislated for, if it had seen fit.”

This question of interpretation is of minor importance, for even if the construction of the Solicitor General be accepted, it is none the less unconstitutional. The difference is one of degree, but not of kind.

Accepting for the sake of argument the Solicitor General's interpretation, I still contend that Congress may not utilize the advantages of second-class rates to *induce* a newspaper to submit to unconstitutional requirements.

Congress can neither enlarge the powers of the Federal Government over the newspaper press by the duress of exclusion from the mails, nor can it do so by bribing the press by the offer of special rates.

In either event it is, to use Marshall's apt language in *McCulloch v. Maryland*, attempting

“under the pretext of executing its powers (to) pass laws for the accomplishment of objects not entrusted to the Government,

and such an act is not

“the law of the land.”

As to the constitutionality of the statute, three possible defenses were open to the Solicitor General.

The *first* was to argue that the requirements of this statute are "appropriate" and "plainly adapted" to the effective and economical carriage of the mails and as such within the implied powers of Congress.

The *second* was to argue that while these statutory requirements are of questionable appropriateness, nevertheless Congress can prescribe the *conditions* upon which second-class rates will be granted, however foreign such conditions may be to the regulation of the mails.

The *third* was to assert that without respect to such regulation, Congress has the absolute and unrestricted power to determine upon what conditions the citizen can use the mails.

Apparently the Solicitor General had little confidence in the first contention. He makes little, if any, effort to argue that these statutory requirements have any legitimate relation either to the effective or economical carriage of the mails or to the classification of mail matter. He does not dispute that the branding of paid matter as an advertisement or the enforced publication of the details of a newspaper publication in its own columns, for the sake of the public, have no bearing upon the question either of the physical carriage of such newspapers or its equitable contribution to postal expenses.

The Solicitor General bases his contention upon the second and third defenses. Between these there is only a difference in degree. The contention is essentially the same, that either by the *duress of a*

threatened exclusion from the mails or by the *inducement of special privileges* as to rates, Congress is competent to effect objects, which the Solicitor General practically concedes are not in themselves appropriate subjects for federal legislation.

The Solicitor General does not shrink from the logic of his contention. With admirable sincerity and with even greater courage he accepts and asserts the full logical extreme of that contention. He boldly asserts that the power of Congress over the mails is "absolute" and "^{also}unrestricted" and that it can use such power for any purpose, however it may otherwise transgress the limited powers of Congress. ~~and however it may offend "the letter and spirit of the Constitution."~~

A more amazing and radical contention has never to my knowledge been submitted to this court.

That I may not be charged with misstating his contention, I quote several typical passages in the Government's brief:

"As an incident to that vast development Congress has, and of necessity must have, absolute power to say what it will exclude from and what it will carry in the mails and the terms, conditions, and postal rates on which it will carry mail matter" (p. 22).

And again:

"We submit, therefore, that Congress has the *unrestrained power* to say what in its

opinion is so hurtful to the public welfare that it shall not pass through the mails; and it *may enforce that opinion without its correctness being subject to judicial review.*" (p. 34).

And again:

"It surely may prescribe *any* conditions concerning the mail matter itself, whether as to size, weight, *character of contents, purpose for which sent, etc., and it may likewise prescribe conditions concerning the person depositing it in the mail*, especially if the conditions attached to the sender bear some relation to the thing sent." (pp. 36, 37).

And again:

"Congress, from time to time, has the *absolute* right to determine for itself whether this or that matter is injurious to the public and therefore should be excluded from the mails or from some favored use thereof." (p. 46).

Nor does the learned Solicitor General, in translating into concrete illustrations these startling assertions of "absolute" and tyrannical power, hesitate to suggest those which would be peculiarly offensive to our form of Government and especially dangerous to free institutions.

He says:

"Again, in the brief for the Journal of Commerce (p. 39) it is suggested that if this

act be upheld there will be nothing to prevent Congress from denying the use of the mails to (or fining) newspapers which are owned by individuals *advocating certain political theories*. A possible abuse of power is no argument against its existence, but we may as well observe that a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal (pp. 38-40, *supra*), as having no relation to the thing carried in the mails *unless the views are expressed in the paper*; but if such views are expressed in the paper Congress can doubtless exclude them, just as Congress could now exclude all papers *advocating lotteries, prohibition, anarchy, or a protective tariff, if a majority of Congress thought such views against public policy.*" (pp. 46, 47).

If, therefore, the next Congress should pass a law that no newspaper should be admitted to the privileges of second-class matter unless its editorial columns should support the views of the majority in the next Congress as to a revision of the tariff, the judiciary would be powerless to prevent such a strangling of free discussion.

If so, it must logically follow that the next Congress could not only bribe the newspaper press of the country into acceptance of lower tariff duties, by the privilege of cheap or free postage, but it could force them into such acquiescence by a denial of any mailing facilities whatever.

The contention of "absolute power" now put forth

without reservation is the very one at which Daniel Webster, when a like proposition was made to purge the mails from anti-slavery political documents, was "shocked" and to which the great interpreter of the Constitution replied :

" Any law distinguishing what shall or what shall not go into the mails, founded on the sentiments of the paper and making a Deputy Postmaster a judge, I should say is expressly unconstitutional."

That neither the next nor any American Congress would so offend the spirit of our institutions does not affect the test of such an illustration.

If the Solicitor General's contention be correct, the illustration quoted by him from the first draft of my brief, on page 37 of his brief, would be apt, for under this theory of federal power, Congress could provide that no editor or publisher could use the mails unless he filed an agreement with the Postmaster General to " vote the prohibition ticket, support the suffragette cause" and appropriate half of his columns to the advocacy of these political views.

While the Solicitor General intimates that these conditions " have no possible relation either to the articles mailed or to the use of the mails " yet he has argued that Congress has " absolute " power and " *may likewise prescribe conditions concerning the person depositing it in the mail*, especially if the conditions attached to the sender bear some relation to the thing sent." (p. 37).

The Government's contention, therefore, does not limit the power of Congress to prescribe conditions as to the thing sent, but also as to the sender, and if this power be an "absolute" power, then it can determine the conditions upon which the postal facilities can be used, and it logically follows that the conditions can refer to the citizen who uses the mails as well as to the mail matter itself.

If this be true, the advocates of a judicial recall need not waste further effort in advocating that method of overriding the Constitution, for Congress can readily accomplish many purposes, which under the Tenth Amendment were reserved to the States and the people thereof, by the simple device of compelling the citizen to do things, in themselves beyond federal power, if he wishes to use the mails.

For example, take the illustration used by the Solicitor General on page 40. He says that while Congress "has no power to regulate the insurance business," yet "it may be quite competent for Congress to say that all matter transmitted by insurance companies in the mails should possess such and such qualifications or be excluded." Therefore Congress, possessed of no power over insurance as such, could provide that no insurance company, which did not have certain corporate characteristics, could transmit anything through the mails, or that it could not transmit through the mails a policy of insurance or accept the premiums therefor unless the policy was of a standard form prescribed by Congress.

The power therefore denied by this court to the

Federal Government under *Paul v. Virginia* could be easily accomplished by prescribing that no insurance company could use the mails unless it conformed to the requirements of an insurance code, which Congress would provide. As no insurance company could transact its business without the use of the mails, this would make entirely practicable a federal supervision of insurance by compelling insurance companies to accept federal requirements, if they wished to use the mails.

In *Adair v. the United States* (208 U. S., 161), this Court declared invalid an act which prohibited an interstate carrier from discriminating against organized labor. Could Congress now pass a law that no railroad corporation could use the mails unless it agreed to employ only Union labor?

In the *Employers' Liability* case (207 U. S., 463) this court adjudged unconstitutional a law prescribing liability to injured employees because it applied to employees of interstate carriers when not engaged in interstate commerce. Could Congress pass a law that such interstate carriers could not use the mails unless they filed an agreement with the Postmaster General to compensate all injured employees, whether engaged in interstate commerce or not?

To show that these illustrations are not fanciful, I venture to call to the attention of the court the current suggestion that while the Federal Government has no power over clearing houses or stock exchanges, they being local commercial facilities and

not instrumentalities of interstate commerce, Congress can compel such institutions to conform to federal laws by the simple expedient of denying them the use of the mails unless they agree to accept such conditions as Congress may prescribe.

This case and the contention of the Government therein has drawn the issue very sharply between an arbitrary and unrestricted government and a restricted and free government.

Either Congress has, as the Solicitor General contends, the power to prescribe "absolutely" and without the possibility of judicial review, the conditions on which the citizen shall use the mails, or Congress has only the power, in carrying out its great function as a carrier of the mails, to prescribe such conditions as have a legitimate and appropriate reference to that function.

Between these two propositions there seems to be no middle ground. Either the power is absolute and unrestrained, however tyrannical its exercise, or the power, only vaguely enumerated in the Constitution, was delegated for a special purpose and the true definition of the power is limited to that purpose and all acts done under the pretense of exercising that power but beyond its legitimate scope, are unconstitutional.

That this belief in the arbitrary right of Congress to pervert federal powers to accomplish unconstitutional ends is a growing doctrine in the political life of this nation is shown in the foot note to page 18 of

my brief, in which I have suggested only a few of the many propositions which have been advanced in recent years to pervert federal powers to attain unconstitutional ends.

No encouragement is found for so pernicious and destructive a doctrine in the decisions of this court.

While asserting the exclusive and plenary power of Congress over interstate commerce in the most emphatic language (See Lottery cases, 188 U. S., p. 321), it has in the same case denied that even a plenary power could be "arbitrary."

While it has asserted the complete power of Congress to determine what shall and what shall not be carried in the mails, yet these general expressions cannot sanction arbitrary use of such power, and this court has never meant that conditions could be imposed upon the exercise of a vital right, which have no legitimate relation to the carriage of the mails.

If this court shall sustain the contention of the Government and thus declare that Congress has an absolute power to declare what the citizen must do in order to avail himself of postal facilities, then we may expect a wide and indefensible extension of federal power, of which neither the generation that framed the Constitution nor any succeeding generation, except the present, would have dreamed as a possibility.

How the statesmen of the middle period of our history would have viewed such an extension of federal power, is indicated by the quotations of my

brief, in which Henry Clay, John C. Calhoun and Daniel Webster agreed that no such censorship of the mails could exist in our free government (pp. 37, 38).

To the framers of the Constitution the proposition now advanced would have been unthinkable. At the time the Constitution was adopted, Dr. Benjamin Rush, one of its signers, said as to the function of the post office :

“ For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States—every state, city, county, village and township in the Union should be tied together by means of the Post Office. This is the true non-electric wire of government. It is the only means of conveying heat and light to every individual in the federal commonwealth. ‘ Sweden lost all her liberties,’ says the Abbe Raynal, ‘ because her citizens were so scattered, that they had no means of acting in concert with each other.’ It should be a constant injunction to the post-masters, to convey newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but the sentinels of the liberties of our country.”

Should this court sustain the contention of the Government in the case at bar, then its great declaration, through Chief Justice MARSHALL, that Congress may not “ under the pretext of executing its powers,

pass laws for the accomplishment of objects not entrusted to the Government" will become for many practical and vital purposes a dead letter.

Respectfully submitted,

JAMES M. BECK,

Counsel for Appellant.

New York, November 30, 1912.

LEWIS PUBLISHING COMPANY *v.* MORGAN,
POSTMASTER IN NEW YORK CITY.

JOURNAL OF COMMERCE AND COMMERCIAL
BULLETIN *v.* BURLESON, POSTMASTER GEN-
ERAL OF THE UNITED STATES.¹

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 819, 818. Argued December 2, 3, 1912.—Decided June 10, 1913.

From the beginning Congress, in exerting its power under the Constitution to establish post-offices, has acted upon the assumption that it is not bound by any hard and fast rule of uniformity, and has always assumed the right to classify in its broadest sense.

Congress always has given, and subject only to the express limitations of the Constitution, can give, special mail advantages to favor the circulation of newspapers, and has also fixed the general standard and imposed conditions upon which these privileges can be obtained. The provisions in § 2 of the Post Office Appropriation Act of 1912 regarding publications and conditions under which they can be carried in the mail construed and *held*, that:

Those provisions are intended simply to supplement existing legislation relative to second class mail matter, and not as an exertion of legislative power to regulate the press, curtail its freedom or to deprive one not complying therewith of all right to use the mail service.

A provision in a departmental appropriation act gives rise to the inference that it concerns the general subject under control of that Department.

A provision in a post-office appropriation act referring to the entering of mail matter refers to second class mail as that is the only class to which the word "enter" can apply.

Requirements in the second paragraph of a statutory provision *held* to apply to articles enumerated in the preceding paragraph

¹ See *post*, p. 600, for proceedings on motion for restraining order in this case.

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Argument for Appellant.

when the words used cannot otherwise be reasonably construed, and when it also appears that as passed by the first enacting chamber the two paragraphs subsequently divided were embodied in one paragraph.

A penalty of denial of the privileges of the mail for failure to comply with requirements applicable only to second class matter does not amount to entire exclusion from use of the mail.

Requirements in regard to publications entitled to be entered as second class mail and sanctioned by the penalty of exclusion from the privileges of such second class, are not to be construed as independent regulation of such publications, but only as condition precedent to retaining the privileges of second class mail after entry of the publication; and so *held* as to the provision that paid for matter in periodicals must be marked "advertisement" under penalty of exclusion from the privileges of the mail.

Legislative history of a statute can be examined to enable the court to construe it.

The requirements in § 2 of the Post Office Appropriation Act of 1912 that certain specified information be presented to the Postmaster General and that all paid for matter, editorial and otherwise, be marked "advertisement" under penalty of exclusion from the privileges of the mail, *held*, not to be an unconstitutional abridgment of the freedom of the press protected by the First Amendment or a denial of due process of law under the Fifth Amendment, or as a denial of the use of the mail, but only a requirement relating to second class mail matter sanctioned by exclusion from the privileges of the mail in that regard.

THE facts, which involve the constitutionality and construction of the provisions in the Post Office Appropriation Act of 1912 in regard to privileges of second class mail matter accorded to magazines and other publications, are stated in the opinion.

Mr. James M. Beck, for Lewis Publishing Company, appellant in No. 819:

To adopt the Government's narrow construction of this statute would be judicial legislation. Its provisions are plain and free from ambiguity. Failure to comply with its requirements subjects "every newspaper" to a denial

of "the privileges of the mails"—not the advantages of second class rates only, but the privilege of using the mail for any purpose.

The act has been thus interpreted by the Attorney General, the Postmaster General, the press and the public. Its position in the appropriation act confirms this interpretation, for it is not included in the subdivision relating to second class matter, but in that which deals with miscellaneous and general legislation. The views expressed by its proponents in Congress confirm the same interpretation.

The present attempt to restrict its meaning was an afterthought to save its constitutionality.

While it is true that this court will accept of two "reasonably susceptible" interpretations the one which is most free from constitutional objection, yet this court should not, in applying this salutary doctrine legislate by reconstructing a statute. *United States v. Reese*, 92 U. S. 214; *James v. Bowman*, 190 U. S. 127.

Either construction of the statute, however, makes it unconstitutional. The difference is one of degree but not of kind. Congress can neither enlarge the powers of the Federal Government over the newspaper press by the duress of exclusion from the mails nor by the inducement of preferential rates. In either event such a statute is an attempted "accomplishment of objects not entrusted to the Government" and therefore "not the law of the land." *McCulloch v. Maryland*, 4 Wheat. 423. Otherwise Congress could indirectly legislate as to many matters which, under the Tenth Amendment, were reserved to the States, by the simple device of compelling a citizen to do things, in themselves beyond Federal power, if he wishes to use the mails, and such a privilege being vital, the citizen would have no choice but obedience to an unconstitutional statute.

This case draws sharply the vital issue between an

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arbitrary and unrestricted Government and a restricted and free Government. Either Congress has, as the Solicitor General contends, the power to prescribe absolutely the conditions on which the citizen shall use the mails or Congress has only the power to prescribe such conditions as to the use of the mails as have a legitimate and appropriate reference to the carriage of the mails.

No encouragement is found for the former view in the decisions of this court. While asserting the exclusive and plenary power of Congress over interstate commerce (see *Lottery Cases*, 188 U. S. 331), this court denied that even a plenary power could be "arbitrary." Similarly, while this court has recognized the plenary power of Congress to determine what shall and what shall not be carried in the mails, yet such general expressions cannot sanction an arbitrary use of such power or justify statutory conditions imposed upon the exercise of a vital right, which have no legitimate relation to the carriage of the mails. Otherwise there would follow an indefensible extension of Federal power, of which neither the generation that framed the Constitution nor any succeeding generation until the present would have dreamed of as a possibility.

This current doctrine of the right to pervert Federal powers to accomplish extra-constitutional ends can be justly characterized as "nullification by indirection."

It is not the doctrine of this court, as is shown by the earlier decisions in *Marbury v. Madison*, 1 Cranch, 138, and *McCulloch v. Maryland*, 4 Wheat. 423, and the later decisions in the *Lottery Cases*, 188 U. S. 331, the *Employers' Liability Cases*, 207 U. S. 463, and *Adair v. United States*, 208 U. S. 161.

The other line of cases, commencing with *Veazie v. Fenno*, 8 Wall. 533, and ending with *McCray v. United States*, 195 U. S. 27, are not inconsistent. They were cases of express powers and arose under the taxing clause of the Constitution. This power is *sui generis* and exhausts

definition and a statute which on its face is a taxing statute cannot, except under very extraordinary circumstances, be invalidated by attributing to Congress a purpose other than to raise revenue. Moreover, the power to tax as a means to regulate industry was recognized long before the Constitution and has been recognized ever since.

A different question arises where the exercise of an alleged implied power is under consideration. Such power is confronted with the Tenth Amendment and can only be sustained under the power "to make all laws necessary and proper for carrying into execution the powers" expressly granted to Congress. A statute, therefore, like the present one, which claims to be thus "necessary and proper" must find its justification not only in the letter of the Constitution but in the facts of human life. To apply the acid test of Chief Justice Marshall (*McCulloch v. Maryland*, 4 Wheat. 423), it must be "appropriate" and "plainly adapted" and "consistent with the letter and spirit of the Constitution." This court has nullified nineteen acts of Congress because they were not as matter of fact plainly adapted to carry out the alleged constitutional grant and this legislation is of that class.

The statute also abridges the freedom of the press. The First Amendment means in substance that no burden or restriction should be imposed upon the press, excepting only in matters of recognized morality and subject always to responsibility at common law for libelous statements. The history, which preceded the First Amendment, clearly shows that it was made to prevent a censorship of the press either by anticipation through a licensing system or retrospectively by obstruction or punishment.

The compulsory disclosure to the public of the circulation of a newspaper is calculated to impair its influence and violate the privacy of its business. By compelling a public disclosure of the editors and owners of newspapers, the right to disseminate ideas impersonally is destroyed.

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At the time the Constitution was adopted, nothing was more familiar to its framers than impersonal journalism. To this day we do not accurately know who wrote the letters of "Junius," and when the Constitution was adopted the most valuable arguments in its support were submitted anonymously by Madison, Hamilton, Jay and many others.

To compel a newspaper to use its own capital, labor facilities and valuable space, to disclose the most intimate secrets of its business to the public, is also a taking of private property without due process of law and without just compensation.

To concede to Congress the power to utilize the mails to discipline the free press of the country would hereafter mean a stricter and more dangerous censorship, for in the matter of arbitrary power, "the appetite grows by what it feeds on."

Mr. Robert C. Morris, with whom *Mr. Guthrie B. Plante* was on the brief, for Journal of Commerce, appellant in No. 818.

The Solicitor General for the United States:

The statute means that in order to obtain the low, second class postage rates all newspapers must comply with two requirements, to-wit:

(A) File with the Post Office Department and publish in the paper the name of the editor; and

(B) Mark as an advertisement any article for the publication of which the newspaper receives compensation; and, in default of so complying, shall be denied the second class postal rates.

The intent of Congress as deduced from the legislative history of the statute shows that Congress in its final enactment of the bill had the same intent that the House had in originally passing it, namely, merely to exclude

from the second class mail privileges all publications that did not comply with the requirements laid down in the act. The changes in the bill all related to the terms of the requirements, and were not intended to affect the broad principle that Congress (pursuant to its power to decide what should be carried by its mails) was limiting the use of the second class mail privileges to those newspapers that would comply with certain regulations which Congress felt it wise to impose as conditions upon such use.

A reasonable construction of the language used shows that the act only applies to newspapers using, or desiring to use, the second class mail privileges.

The words "this paragraph" refer to the whole subject of newspaper regulation.

The purpose of the special penalty for violating the advertisement clause is to enable the post office to properly enforce the act.

The true construction that should be adopted is, *First*, That Congress did not attempt to regulate all newspapers, magazines, etc., but only those that used the second class mail privileges; *Second*, That Congress prescribed certain things which those publications must do in order to continue the use of the second class privileges; *Third*, That Congress denied the use of the second-class privileges only to such publications as, after ten days' notice, still refused to comply therewith; and, *Fourth*, That Congress prescribed a moderate fine for any publication which (while complying with the first paragraph and thereby securing the continued use of the mails) inserted paid-for articles without marking them "advertisement."

This construction should be adopted, as any other might invalidate the statute.

Under the power to establish post offices and post roads, Congress has the absolute right to determine what matter may be carried in and what matter may be excluded from the mails; and it may declare the conditions on which it

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will carry articles and that a given class of matter (news-papers, etc.) shall not be carried at the second class rate unless such matter conforms to every requirement Congress may prescribe. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 133; *Public Clearing House v. Coyne*, 194 U. S. 497.

The present statute is a mere exercise of the right to determine what shall be admitted to the mails.

Appellants' argument that Congress had no power to enact the statute in question is based on an assumed erroneous construction of the act.

In the exercise of an admitted power Congress may indirectly accomplish results which it would have no power to accomplish directly. *Employers' Liability Cases*, 207 U. S. 463, 502; *McCray v. United States*, 195 U. S. 27.

The statute is not a law "abridging the freedom of the press." *Francis v. United States*, 188 U. S. 375; *France v. United States*, 164 U. S. 676; *In re Rapier*, 143 U. S. 110.

The freedom of the press only imports the right to print and circulate, but does not give any vested right to use any particular postal rate.

The statute does not deprive appellants of either liberty or property without due process of law, nor does it take private property for public use without just compensation.

A court of equity will not, by injunction, restrain the prosecution of criminal proceedings. *In re Sawyer*, 124 U. S. 200, 210-211; *Harkrader v. Wadley*, 172 U. S. 148, 170; *Fitts v. McGhee*, 172 U. S. 516, 531-533; *Hemsley v. Myers*, 45 Fed. Rep. 283; *Wagner v. Drake*, 31 Fed. Rep. 849; *Logan v. Postal Telegraph Co.*, 157 Fed. Rep. 570; 2 Story Eq. Jur., § 893; High on Injunctions, 4th ed., § 68; Joyce on Injunctions, §§ 58-60a.

If the "advertisement" paragraph should be held void, it is separable and should not affect the validity of the balance of the statute. *Bank of Hamilton v. Dudley*, 2 Pet. 492, 526; *Field v. Clark*, 143 U. S. 649, 695; *Income*

Tax Cases, 158 U. S. 601, 635; *Trade-Mark Cases*, 100 U. S. 82, 98; *Baldwin v. Franks*, 120 U. S. 678, 687; *Poindexter v. Greenhow*, 114 U. S. 270, 304; *Employers' Liability Cases*, 207 U. S. 463, 501; *Packet Co. v. Keokuk*, 95 U. S. 80, 89; *Presser v. Illinois*, 116 U. S. 252.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Post Office Appropriation Act of August 24, 1912, 37 Stat. 539, 553, 554, c. 389, in § 2, contains the following:

"SEC. 2. . . . That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed

next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."

The two appellants, publishers of newspapers in the City of New York, complaining that this legislation abridged the freedom of the press protected by the First, and constituted a denial of the due process of law guaranteed by the Fifth, Amendment to the Constitution, filed their bills against designated officials of the United States to prevent the enforcement of the provision in question. The bills were dismissed for want of equity and this appeal was taken directly to this court, because of the rights asserted under the Constitution. Coming to define the controversy in order to appreciate and restrict the issues to the end that we may pass on none but the questions which are necessary to be decided, it is to be observed that there are some differences in the mode in which the cases are stated in the pleadings and in the argument. But after all, these divergencies give rise to no real distinction between the two cases and we hence treat them as one. At the outset, in order to state in the most direct way the grievances which the publishers deem they have suffered, we reproduce, retaining the italics, the statement made on that subject in the opening passages of the argument of the counsel for the Lewis Publishing Company:

"The newspaper law, whose constitutionality is in this suit called into question, is neither in form nor substance a law to regulate the carriage of the mails but *to regulate journalism*.

"In this respect it has the merit of sincerity. It does not pretend to be in aid of the Post Office Department. That Department did not seek its enactment but protested against it.

"The law in question makes no reference to the mails except that it uses exclusion therefrom *as a means of enforcing this censorship of the press*.

"Even this remote connection is wanting in the latter section of the law, which requires paid reading matter to be formally branded as an advertisement. Its enforcement is left to a criminal action for a penalty.

"The law has two plainly avowed objects.

"The first is to compel a disclosure to the Government, under oath, of the names and addresses of the editors, publishers, business managers and owners, stockholders, security creditors and the daily circulation of such newspapers for the preceding six months.

"*This will be hereafter referred to as the inquisitorial provision.*

"The second object is to compel a disclosure to the public through newspaper publication of these facts and also whether any editorial or reading matter in such publication has been inserted for a valuable consideration.

"*This will be hereafter referred to as the publicity provision.*

"The publicity provision cannot be referred to any proper function of the Post Office Department. Its function is to carry the mails and in such carriage it cannot matter whether *the public* are advised as to the ownership, editorial direction and circulation of a newspaper or not, or whether the matter which it publishes is published for a consideration."

And thus interpreting the assailed provision not as a

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mere exertion of legislative power to additionally prescribe the conditions by which publishers might continue to enjoy the right to participate in the large pecuniary advantages and other privileges created in their favor through the classification of mail matter, but on the contrary treating the provision as a substantive exercise of a legislative authority not possessed and which unduly restricted the freedom of the press, thinly disguised as a regulation of the mails and enforceable by an absolute exclusion from the right to all mail service—the legal propositions advanced are as follows:

"1. The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid reading matter to be marked as an advertisement.

"2. The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any law 'abridging the freedom of the press.'

"3. The requirement that a certain class of newspapers shall disclose to the public by publication the most intimate details of their business, and use their own capital, labor facilities and valuable space for such disclosure, is a taking of 'liberty' and 'property' without due process of law and a like taking of valuable property rights for an assumed public use without just compensation."

On the other hand, putting aside what we deem to be minor subdivisions, broadly stated, all the contentions of the Government are reducible to the following: (a) That the assailed provision in no sense can be considered as an attempted exertion of power to regulate the freedom of the press or even as the exercise of the legislative authority to regulate the mails in the larger or general sense of that term since, when rightly construed, the provision only deals with what is known as second class mail matter, and imposes conditions necessary to be complied with to

enable publishers to participate in the great and exclusive privileges and advantages which arise from the right to use the second class mail. (b) That the precedent conditions thus imposed are relevant to the purpose which was intended to be accomplished by Congress in creating the second class mail privilege and are either directly or incidentally embraced in the power to regulate the mails and in doing so to confer the second class privilege. (c) That even if these propositions be not well founded and the provision be given the significance attributed to it by the publishers, nevertheless it is valid as an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative selection as to what shall be carried in the mails and which therefore is not in any wise subject to judicial control even although in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy.

From this statement of the opposing contentions it is apparent that the first and fundamental cause of difference arises from the widely conflicting views entertained concerning the meaning of the assailed provision, and that hence it becomes primarily necessary to settle such differences, that is, to determine the true meaning of the provision. Moreover, as the controversy concerning the meaning of the provision involves its relation to the law concerning the carriage of newspapers in the mails in force at the time of the passage of the provision and an appreciation of its letter and spirit, it also becomes necessary to consider that law, its origin and development.

An abstract of the laws relating to the postal service from early Colonial times (1639), and under the Constitution down to, and including the year 1888, will be found in the report of the Postmaster General for the year 1888. A condensed yet comprehensive statement of the general

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results of the legislation from the first statute on the subject, February 20, 1792, 1 Stat. 232, c. 7, to the act of May 12, 1910, 36 Stat. 366, c. 230, is contained in the report of the Commission on Second-class Mail Matter, communicated by the President to Congress on February 22, 1912, pp. 13-18.

A consideration of the abstract made by the Postmaster General above referred to and of the synopsis contained in the report of the Commission, leaves no doubt that from the beginning Congress, in exerting the power to establish post-offices and post-roads, has acted upon the assumption that it was not bound by any hard and fast rule of uniformity, that is to say, that in exerting its power on the subject of the mails it has always considered that the right to classify in the broadest sense was enjoyed, and, consequently, depending upon conceptions of public good to be accomplished irrespective of the mere cost of carriage, the rates of mail have varied and the privileges accorded have changed from time to time. All the power which has been exerted is derived from the grant to Congress, in Art. I, § 8 of the Constitution to establish post-offices and post-roads. And the wise combination of limitation with flexible and fecund adaptability of the simple yet comprehensive provisions of the Constitution are so aptly illustrated by a statement in the argument of the Government as to the development of the postal system, that we insert it as follows:

“Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employés, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billion of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money-order system, by which more than a half

a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and criminal schemes impossible to be reached in any other way."

Only particularly concerned as we are with the legislation relating to the carriage of newspapers in the mails we need not stop to generally demonstrate the accuracy of the statements we have made. An abstract from and reference to the statutes chronologically arranged, relating particularly to discriminations in favor of the carriage of newspapers in the mail, will be found in a statement made by W. A. Glasgow, Jr., Esq., before the Postal Commission of 1906-7, forming part of House Document, vol. 98, beginning at p. 541. And a consideration of the statutes referred to in this abstract will demonstrate the legislative inauguration of and persistent adhesion to what is aptly described in the report of the Commission on Second-class Mail Matter as "the historic policy of encouraging by low postal rates the dissemination of current intelligence." Indeed, we think also that it is not open to controversy that a review of these statutes will demonstrate that it was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages, but that it also possessed the authority to fix a general standard to which publishers seeking to obtain the proffered privileges must conform in order to obtain them. Nothing affords a more apt illustration of the assumed existence of the power in Congress to discriminate on the subject than was shown as early as 1845 by the act of March 3 of that year, 5 Stat. 736, c. 43, § 9, by which, although there was secured to the Government a virtual monopoly in the transportation "of any letters, packets, or packages of letters," by forbidding the establishment of "any private express or expresses" for their conveyance on mail routes, it was declared that the

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restrictions should not apply to the transportation of newspapers, pamphlets, magazines and periodicals.

But it is useless to pursue the subject in detail, since as the result of legislation, beginning with the act of March 3, 1863, c. 71, 12 Stat., pp. 701, 704 *et seq.*, and embracing statutes which are noted in the margin,¹ it had come to pass on August 24, 1912, when the provision here assailed was enacted, that mail matter, disregarding mere subordinate subdivisions, was divided into four general classes, the first class embracing letters and printed matter, the second class covering newspapers and periodicals, the third, books and pamphlets and the fourth merchandise. And it is obvious and is not disputed, that the classification thus adopted was based, not upon merely inherent distinctions or differences in the nature and character of the articles asailable matter and the cost of their carriage, but rested upon broad principles of public policy; in other words, upon the conceptions of Congress as to how far it was wise for the general welfare to give advantages to one class not enjoyed by another. It is not necessary to stop to enumerate the exceptional privileges, and great advantages which were offered to publishers of newspapers by the classification thus adopted, since it is not questioned that as a result of giving them the benefits of the second class rates, pecuniary advantages of great consequence to them resulted which when conjoined with the exceptional administrative and other privileges, which were accorded under that classification undoubtedly operated a very great discrimination in

¹ Act of June 8, 1872, c. 335, §§ 99 *et seq.*, 17 Stat. 283, 296; June 23, 1874, c. 456, §§ 5 *et seq.*, 18 Stat. 232; July 12, 1876, c. 179, § 15, 19 Stat. 78, 82; March 3, 1879, c. 180, § 7 *et seq.*, 20 Stat. 355, 358; June 9, 1884, c. 73, 23 Stat. 40; March 3, 1885, c. 342, 23 Stat. 385, 387; July 16, 1894, c. 137, 28 Stat. 105; June 6, 1900, c. 801, 31 Stat. 660; May 12, 1910, c. 230, 36 Stat. 366. See, also, act of August 24, 1912, 389, 37 Stat., p. 551.

their favor. It was obviously this result of the legislation which caused the Postmaster General at page 6 of his report to Congress, for the year 1907, to say that "by acts of Congress passed in 1874, 1879, 1885 and 1894, a privileged class has been created." And without going into detail or intending by citing them to treat the figures as being other than illustrative, the subject is illumined by a statement made in the brief for the Government, that the rate for first class or letter mail is of such a character as to produce a profit of seventy millions a year to the Government, while for the second or newspaper class the rates are such as to entail upon the Government a loss of seventy millions of dollars each year, a result which it is moreover stated is brought about by the fact that letter mail under the classification is subjected to a rate eighty times higher than that given newspapers under the second class and that while not so large, a very great discrimination also exists against the other classes and in favor of the second class.

But the mere distinction between the classes is not the only measure of the exceptional privileges accorded to publishers, for within the second class under which they are placed, advantages are given them not possessed by others in that class. For instance, the postage on a newspaper coming under the second class rate when mailed by an individual is higher than is the rate of postage exacted for the mailing of the same newspaper by publishers or news agents. While it cannot be questioned that the conferring of the special privileges above stated, were at least in form a discrimination against the public generally, beyond doubt, however, in the legislative mind they were deemed not to be of that character because the purpose of their bestowal was to secure to the public the benefits to result from "the wide dissemination of intelligence as to current events." Certain, however, as is this view, it is equally also certain that for the purpose of securing the

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public benefits which it was conceived would result from the giving of the privilege, it was deemed that the power and duty existed to fix a standard which should be complied with by those who wished to enjoy the privilege,—a result manifested by the following provisions of § 14 of the act of March 3, 1879, c. 180, 20 Stat. 355, 359:

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguished printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; *Provided, however,* That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And the long settled administrative practice in enforcing these conditions serves to show what was deemed to be their importance and the necessity for applying them to the end that the results intended to be accomplished by Congress might be realized. Prior to 1887 the enforcement of the conditions exacted as a prerequisite to the enjoyment of second class mail privileges depended upon the action of postmasters throughout the United States and although in the discharge of their duty they were governed by regulations and instructions promulgated by the Post Office Department, there was certainly laxity

and possible confusion. In 1887, to remedy this condition under the authority conferred upon him by Rev. Stat., § 396, the Postmaster General promulgated new rules and regulations. It suffices briefly to point out the means by which uniformity in administration was secured. Those desiring to obtain the second class privileges were compelled to make written application for entry of their publications at the local post office, to file copies of the publications, to make affidavit to the essential facts and to make written answers to questions propounded which were deemed to be essential to show the existence of the conditions precedent imposed by the statute. A copy of the questions required to be answered are in the margin.¹

¹ From Postal Laws and Regulations—ed. 1902, p. 198.

V.—APPLICATIONS FOR ENTRY OF PUBLICATIONS AS SECOND CLASS MATTER.

SEC. 438. When a publication, not included in sections 429 and 430 (see secs. 427 and 428), is offered for mailing for the first time at the second-class rates of postage the postmaster shall require the proprietor or his duly authorized representative to make and present to him, with two copies of the publication, sworn answers in writing (on Form 3501) to the following interrogatories:

- (1) How often is the publication issued?
- (2) Where is the "known office of publication"? (If in a city give street and number.)
- (3) Where is it printed?
- (4) Who are the proprietors?
- (5) Are they in any way interested pecuniarily in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?
- (6) Who are the editors of the publication, and how is their compensation determined?
- (7) Have the editors any pecuniary interest in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?
- (8) Can any house in good standing advertise in your publication at the regular published rates?
- (9) Are advertisements of competitors accepted at the usual rates?
- (10) Have any of the business houses which advertise in your pub-

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One controlling authority for passing upon all applications for entry was provided by vesting the Third Assistant Postmaster General with power to that end, that officer being authorized in case of approval of the application to empower the postmaster at the proper office to issue a certificate of entry. Upon the issue of the certificate it was made the duty of the publisher to print upon each copy of the publication, so entered, the following:

lication any interest (either by past connection or special contract) therein respecting advertisements or subscriptions? If so, what is the interest?

(11) What is the greatest number of copies furnished to any person or firm advertising in your publication?

(12) On what terms are these papers furnished?

(13) What number of copies do you print of each issue?

(14) What number of bona fide subscribers have you for the next issue of your paper, made up as follows:

a. Direct individual subscriptions to publisher without premium?

b. Direct individual subscriptions to publisher with premium?

c. Direct individual subscriptions in clubs or through clubbing arrangements?

d. Copies regularly sold over publishers' counter to purchasers of individual copies?

e. Copies regularly sold by newsboys?

f. Regular sales of consecutive issues by news agencies?

g. Bulk purchases of consecutive issues by news agencies for sale without the return privilege?

h. Copies to advertisers, one to each to prove advertisement?

i. Bona fide exchanges, one copy for another, with existing second-class publications?

(15) What is the subscription price of your publication per annum?

(16) How many pounds weight will cover the papers furnished to regular subscribers?

(17) What average number of specimen copies with each issue do you desire to send through the mails at the pound rate?

(18) How are the names of the persons to whom sample copies are to be sent obtained?

(19) What disposition is made of the excess, if any, of copies printed over those furnished to subscribers, news agents, including newsboys, and as sample copies.

"Entered—at the post office at—as second class matter under the act of—."

It is true to say that these regulations promulgated in 1887, modified in some respects not material here to be considered, were continuously in force from their adoption up to the time the statutory provision here in question was enacted, and had therefore been in operation for about twenty-five years.

In the light of this statement concerning the evolution of the law, as to mail-matter and its classification, as it existed at the time the provision here involved was enacted, we come to dispose of the controversy as to the meaning of that provision, the question which we are called upon to solve being this:

Was the provision intended simply to supplement the existing legislation relative to second class mail matter or was it enacted as an exertion of legislative power to regulate the press, to curtail its freedom, and under the assumption that there was a right to compel obedience to the command of legislation having that object in view, to deprive one who refused to obey of all right to use the mail service? When the question is thus defined its solution is free from difficulty, since by its terms the provision only regulates second class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second class classification.

The reasons which cause us to think this to be the case are these: (a) Because the provision is part of a post-office appropriation act and naturally therefore, gives rise to the inference that it concerns the general subject of the mails, there being an entire absence of anything justifying even a surmise, if such a point of view could be indulged in under any circumstances, that Congress was intentionally exerting power not delegated to it and consciously

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violating an express prohibition of the Constitution and for that reason clothed its exertion of power in the disguise of postal legislation; (b) because the text makes clear the fact that the legislation was exclusively addressed to the regulation of second class mail and was shaped in contemplation of the long established law and regulations governing that class. This result becomes apparent when it is observed that the provision makes it the duty of the publisher to "enter" his publication, since by practice and regulation prevailing during a long period of time, it had come to pass that the word "enter" had exclusive relation to a duty to be performed in order to obtain the benefits of the second class classification. In the absence, therefore, of some express indication to the contrary, no other conclusion is possible, than that the word was used with reference to its received official and administrative significance. In fact, in view of the history which we have given of the development of the second class classification, and the reasons which led to the system of entry, unless the settled significance of the word be given to it, it would have no meaning whatever.

Further, we think that because as finally enacted the provision which was in one paragraph as it passed the House of Representatives, in the Senate was divided into two paragraphs, affords no ground for contending that the requirement as to advertisements contained in the second printed paragraph is not embraced within and controlled by the conclusion we have stated. We say this because the second printed paragraph by reference clearly manifests that its provision applied to "such" newspapers, periodicals, etc., that is, the newspapers or periodicals covered by the first paragraph and which by its terms are submitted to the duty of entry in order to enjoy the privileges conferred. Nor do we think there is in reason ground to support the proposition that because the provision sanctioned the duty to make entry by an exclusion from

the mails it hence is a general regulation and not simply one conferring the right of availing of the second class privileges. The proposition assumes that the command is that for failure to comply with the conditions imposed there shall be a denial of the use of the mails, while in fact the provision is, there shall be a denial of the "privileges" of the mail, a qualification which in view of the great advantages given by the second class mail classification and of the fact that in the reports made to Congress concerning that classification, attention was directed to the circumstance that a privileged class was thereby created, goes to show the conscious purpose to provide only for the exceptional privileges with which the provision was dealing.

Equally wanting in force is the further contention that because the regulation in the second paragraph to the effect that paid matter shall be marked as advertisement is sanctioned by a penalty, therefore, at least as to such provision, an independent regulation of the press was intended, divorced from the requirements as to entry contained in the first paragraph. We reach this conclusion because when the paragraph referred to is accurately considered it makes more cogent the view we have taken and additionally demonstrates that the legislative mind in enacting it, was sensitively alive to the fact that the provision alone concerned the privileges of second class mail, and the administrative rule which for so many years prevailed on the subject. In other words, that as, under existing administrative regulations, the exactions as to entry contemplated conditions existing at the time of the application for entry, and the condition as to advertisements concerned conduct of a publisher after entry, which could not therefore be a condition precedent to entry, a penalty for the latter was devised in order to harmonize with the requirements as to admission to the second class mail.

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But even if we were to omit the word privilege which qualifies the exclusion from the mails as provided in the first paragraph so as to cause the provision to read "shall be denied the (privileges of the) mails," there would be nevertheless no room for doubt. As we have seen, coeval with the establishment of the system of entry, as the means of securing the privileges of the second class mail and presumably because of the overshadowing advantages and benefits which were conferred by that system upon those entitled to participate in them, the right to such admission came to be indifferently described as "the entry to the mails of newspapers," etc., the "publications admitted to the mails," etc., and the duty which was cast upon the Third Assistant Postmaster General, in passing upon such subjects as "The responsibility of finally admitting such matters to the mail," etc. See the report of the Third Assistant Postmaster General contained in the report of the Department for the year 1887, at page 699, where, after referring to the regulations concerning entry, the quoted expressions are employed. Moreover, when it is considered that the provision was dealing only with the second class privilege, it cannot in reason be assumed that conditions were imposed dealing with a subject with which the statute was not concerned, in order thereby to afford ground for asserting it to be unconstitutional, when the elementary rule is that every reasonable intendment to avoid such a result must be indulged in. *United States v. Delaware and Hudson Co.*, 213 U. S. 366, 407. Without stopping however to review the subjects in detail we content ourselves with saying that we think neither the reference to expressions in debate, upon the concession for the sake of argument that they are competent to be looked at, nor an opinion of the Attorney General upon which reliance is placed, are adequate to control or modify the conclusion we have reached as to the meaning of the provision.

But granting that room for doubt remains after the analysis of the text, which has preceded, we are of opinion that the legislative history of the adoption of the provision makes that conclusion indisputable for the following reasons: 1. Since the bill as introduced in the House of Representatives, contained but one paragraph and obviously related to the privileges of the second class mail alone; 2d, because although the bill as reported to the Senate by the committee to which it was there referred, was somewhat modified as to the conditions exacted, and was divided into two paragraphs, the report of the committee leaves no doubt that there was no purpose to disintegrate the provision as it passed the House of Representatives, by making two enactments or to do anything more than to exact additional conditions for the right to enjoy the second class mail privileges, the latter result being clearly shown by the following excerpt from the report of the committee. (Report No. 955, p. 24.)

"The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequalled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them."

As therefore the assailed provision when rightly construed only affixes additional conditions for admission to a privileged class of mail, and it was merely designed to provide for the continuance on compliance with designated conditions of a system under which vast sums of public

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money were expended, to the end that the power and influence of the press might be expanded, it results that there was no foundation for the meaning attributed to the provision in question by the complainants and on which the grievances upon which they relied rested.

We come then to determine whether the provision as thus construed is valid. That Congress in exerting its power concerning the mails has the comprehensive right to classify which it has exerted from the beginning and therefore may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement; the exertion of the power of course, at all times and under all conditions being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power of Congress in "the interest of the dissemination of current intelligence" to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers. Although in the form in which the contentions here made by the publishers which we have at the outset reproduced, as literally stated, seem to challenge this proposition by suggesting that the power of Congress to classify is controlled and limited by conditions intrinsically inhering in the carriage of the mails, we assume that such apparent contention was merely the result of an unguarded form of statement, since we cannot bring our minds to the conclusion that it was intended on behalf of the publishers to generally assail as an infringement of the constitutional prohibition against the invasion of the freedom of the press the legislation which for a long series of years has favored the press by discriminating so as to secure to it great pecuniary and other concessions

and a wider circulation and consequently a greater sphere of influence. If, however, we are mistaken in this view, then, we think, it suffices to say that the contention is obviously without merit. This being true the attack on the provision in question as a violation of the Constitution because infringing the freedom of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second class mail classification. The question therefore is only this, Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second class classification or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution? We say this is the question since necessarily if the power exists to legislate by discriminating in favor of publishers, the right to exercise that power, carries with it the authority to do those things which are incidental to the power itself or which are plainly necessary to make effective the principal authority when exerted. In other words, from this point of view, the illuminating rule announced in *McCulloch v. Maryland* and *Gibbons v. Ogden*, governs here as it does in every other case where an exertion of power under the Constitution comes under consideration. The ultimate and narrow question therefore is, Are the requirements of the provision in question incidental to the purpose intended to be secured by the second class classification?

Let us consider the matter from the historical and from the inherent standpoint. Under the statute, as we have seen, for a long series of years a publication primarily devoted to advertisements was not entitled to the benefit of the second class classification, and by a long administrative construction, embodied in the regulations, the disclosure of the names of the proprietors as well as of the

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editors of a publication which has sought to be entered as second class matter was required. The new conditions imposed are first, that where there is matter the publication of which is paid for, the fact of such payment shall be disclosed by marking the matter as an advertisement, and second, the disclosure as to ownership, etc., previously exacted is enlarged by making it necessary in the case of a corporation to furnish the names of the stockholders and also requiring that the names of the principal creditors, etc., be given. As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second class mail, it is impossible in reason to perceive why the new condition as to marking matter which is paid for as an advertisement is not equally incidental to the right to classify. And the additional exactions as to disclosure of stockholders, principal creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right of admission to the classification. We say this because of the intimate relation which exists between ownership and debt, since debt in its ultimate conception is a dismemberment of ownership and the power which it confers over an owner is by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself. Considered intrinsically, no completer statement of the relation which the newly exacted conditions bear to the great public purpose which induced Congress to continue in favor of the publishers of newspapers at vast public expense the low postal rate as well as other privileges accorded by the second class mail classification can be made than was expressed in the report of the Senate committee, stating the intent of the legislation which we have already excerpted, that is, to secure to the public in

"the dissemination of knowledge of current events," by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement. We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.

It may be deemed from what we have said in considering the asserted repugnancy of the conditions imposed by the provision under examination that we have assumed that if the attack made upon such conditions was well founded and they therefore would disappear, nevertheless the right to continue to enjoy the second class mail privileges would remain, but we have not considered that subject and intimate no opinion upon it.

Finally, because there has developed no necessity of passing on the question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated.

Decrees affirmed.